

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 238

UNITED STATES, APPELLANT,

VS.

SEALY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

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	Original	Print
No. 278—Letter dated February 22, 1951 from Louis G. Haas of Sealy Company of the S.E. to Sealy, Inc., Chicago, Ill.	624E	555
No. 279—Letter dated March 27, 1951 from E. H. Bergmann of Sealy, Incorporated to Sealy Mattress Company, Reading, Pa.	625	556
No. 280—Letter dated April 13, 1951 from E. H. Bergmann of Sealy, Incorporated to Sealy Mattress Company, Reading, Pa. (excerpts)	627E	557
No. 281—Letter dated May 23, 1951 from E. H. Bergmann of Sealy, Incorporated to Sealy Mattress Company, Reading, Pa.	629E	558
No. 282—Letter dated June 6, 1951 from E. H. Bergmann of Sealy, Incorporated to Mr. J. R. Lawrence, Chicago, Ill.	630E	559

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No. 285—Letter dated May 7, 1951 from E. H. Bergmann of Sealy, Incorporated to Fisher Products Company, Chester, Pa.	631E	561
No. 289—Letter dated July 10, 1951 from Irving L. Fisher of Fisher Products Company to Sealy, Inc., Massillon, Ohio	633E	563
No. 290—Letter dated July 18, 1951 from E. H. Bergmann of Sealy, Incorporated to Fisher Products Company, Chester, Pa.	634E	565
No. 291—Letter dated April 10, 1952 from Linda Ballard of Sealy Company of the S.E. to Sealy, Incorporated, Chicago, Ill.	635E	566
No. 295—Letter dated July 15, 1952 from J. R. Lawrence of Sealy, Incorporated to Sealy Mattress Company, Richmond, Va.	636E	568
No. 296—Letter dated July 17, 1952 from Sidney Sutherland of Sealy Mattress Company to J. R. Lawrence of Sealy, Incorporated, Chicago, Ill.	638E	569
No. 297—Letter dated August 4, 1952 from J. W. Moffitt, Jr. of Peerless Mattress Company to Sealy, Inc., Chicago, Ill.	640E	572
No. 298—Letter dated August 8, 1952 from E. H. Bergmann to J. R. Lawrence	644E	576
No. 299—Letter dated August 18, 1952 from J. R. Lawrence of Sealy, Incorporated to Peerless Mattress Co., Inc., Lexington, N.C.	645E	577
No. 300—Letter dated November 11, 1952 from J. V. Moffitt, Jr. of Peerless Mattress Company to Sealy, Incorporated, Chicago, Ill.		580

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 300-A—Letter from J. R. Lawrence to J. V. Moffitt, Jr., Lexington, N.C.	653E	582
No. 301—Letter dated November 25, 1952 from J. V. Moffitt, Jr. of Peerless Mattress Company to Sealy, Incorporated, Chicago, Ill.	654E	587
No. 302—Letter dated December 24, 1952 from J. R. Lawrence of Sealy, Incorporated to Sealy Mattress Company, Richmond, Va.	655E	589
No. 303—Letter dated December 29, 1952 from Sidney Sutherland of Sealy Mattress Company to Mr. J. R. Lawrence of Sealy, Incorporated, Chicago, Ill.	656E	590
No. 304—Letter dated January 23, 1953 from E. H. Bergmann of Sealy, Incorporated to Mr. Joseph Rudick of Sealy Mattress Company, Baltimore, Md. (excerpts)	659E	593
No. 305—Letter dated January 26, 1953 from Joseph Rudick of Sealy Mattress Co. to Mr. Earl H. Bergmann of Sealy, Inc., Cleveland, Ohio.	661E	594
No. 306—Letter dated February 9, 1953 from E. H. Bergmann of Sealy, Incorporated to Mr. J. V. Moffitt, Jr. of Sealy of the Carolinas, Lexington, N.C.	663E	596
No. 307—Letter dated February 9, 1953 from E. H. Bergmann of Sealy, Incorporated to Mr. Sidney Sutherland of Sealy Mattress Company, Richmond, Virginia.	664E	597
No. 308—Letter dated February 9, 1953 from E. H. Bergmann of Sealy, Incorporated to Mr. Joseph Rudick of Sealy Mattress Company, Baltimore, Md.	665E	598
No. 308-A—Letter dated February 9, 1953 from E. H. Bergmann to Joseph Rudick.	666E	599
No. 309—Letter dated February 9, 1953 from E. H. Bergmann of Sealy, Incorporated to Mr. T. C. Engelhardt of Sealy Mattress Company, Reading, Pa.	667E	600
No. 310—Letter dated February 17, 1953 from E. H. Bergmann of Sealy, Incorporated to Mr. J. V. Moffitt, Jr. of Sealy of the Carolinas, Lexington, N.C.	668E	601
No. 311—Letter dated February 20, 1953 from E. H. Bergmann to Mr. J. R. Lawrence.	669E	601
No. 312—Letter dated February 12, 1953 from Sidney Sutherland of Sealy Mattress Company to J. R. Lawrence of Sealy, Inc.	670E	602

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 313—Letter dated February 12, 1953 from Sidney Sutherland of Sealy Mattress Company to Mr. E. H. Bergmann of Sealy, Incorporated	671E	603
No. 314—Letter dated February 16, 1953 from J. R. Lawrence of Sealy, Incorporated to Mr. Sidney Sutherland of Sealy Mattress Company	672E	604
No. 315—Letter dated February 19, 1953 from Sidney Sutherland of Sealy Mattress Company to J. R. Lawrence of Sealy, Incorporated	673E	605
No. 316—Letter dated March 6, 1953 from E. H. Bergmann of Sealy, Incorporated to Mr. T. C. Engelhardt, Sr. of Sealy Mattress Company, Reading, Pa.	674E	606
No. 317—Letter dated August 29, 1952 from E. H. Bergmann of Sealy, Incorporated to Sealy Mattress Company, Detroit, Michigan	676E	608
No. 31—Letter dated August 16, 1954 from E. H. Bergmann of Sealy, Incorporated to Mr. Morris A. Kaplan of Sealy Mattress Co., Chicago, Ill.	677E	609
No. 319—Letter dated September 15, 1954 from C. B. McGillivray of Sealy Mattress Company to Mr. E. H. Bergmann of Sealy, Incorporated, Chicago, Ill.	679E	611
No. 320—Letter dated September 28, 1954 from E. H. Bergmann of Sealy, Incorporated to Mr. C. B. McGillivray of Sealy Mattress Company, Chicago, Ill.	680E	612
No. 321—Letter dated October 6, 1954 from C. B. McGillivray of Sealy Mattress Company to Mr. E. H. Bergmann of Sealy, Incorporated, Cleveland, Ohio	682E	614
No. 322—Letter dated October 7, 1954 from Morris A. Kaplan of Sealy Mattress Company to Mr. E. H. Bergmann of Sealy, Incorporated, Cleveland, Ohio	684E	616
No. 323—Letter dated October 11, 1954 from E. H. Bergmann of Sealy, Incorporated to Mr. C. B. McGillivray of Sealy Mattress Company, Chicago, Illinois	686E	618
No. 324—Letter dated October 29, 1954 from Morris A. Kaplan of Sealy Mattress Company to Mr. E. H. Bergmann of Sealy, Incorporated, Cleveland, Ohio	688E	620
No. 325—Inter Factory Correspondence of Sealy, Incorporated, dated January 12, 1955 from J. R. Lawrence to Mr. Johnson	689E	621

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

• Government's Exhibits—Continued.

	Original	Print
No. 326—Letter dated January 26, 1955 from J. R. Lawrence of Sealy, Incorporated to Mr. Joseph F. Haas of Haas, Holland & Blackshear, Atlanta, Ga.	690E	622
No. 327—Letter dated June 9, 1956 from Peter D. Brown of Sealy Mattress Company to Mr. Earl Bergmann of Sealy, Incorporated, Chicago, Ill.	691E	623
No. 328—Letter dated June 12, 1956 from E. H. Bergmann of Sealy, Incorporated to Mr. M. A. Kaplan of Sealy Mattress Company, Chicago, Ill.	692E	624
No. 329—Letter dated June 15, 1956 from Morris A. Kaplan of Sealy Mattress Company to Mr. E. H. Bergmann of Sealy, Incorporated, Chicago, Ill.	693E	625
No. 330—Letter dated December 4, 1952 from E. H. Bergmann of Sealy, Incorporated to Sealy Mattress Company, Kansas City, Mo.	694E	627
No. 331—Letter dated January 14, 1953 from E. H. Bergmann of Sealy, Incorporated to Mr. Edgar Haas, Sr. of Slumber Products Corporation, Memphis, Tenn.	695E	628
No. 332—Letter dated January 19, 1953 from Ross S. Rosenberg of Sealy Mattress Company to Sealy Mattress Company (excerpts)	697E	630
No. 333—Letter dated January 14, 1953 from Morris A. Kaplan of Sealy Mattress Company to Mr. Ross Rosenberg of Sealy Mattress Company, St. Paul, Minn.	699E	631
No. 334—Letter dated January 27, 1953 from J. R. Lawrence of Sealy, Incorporated to Mr. H. L. Forbes of Sealy Mattress Company, Louisville, Ky.	702E	633
No. 335—Letter dated January 28, 1953 from Harry L. Forbes to Mr. J. R. Lawrence of Sealy, Inc., Chicago, Ill.	703E	634
No. 336—Letter dated June 26, 1953 from J. V. Moffitt, Jr. of Sealy of the Carolinas, Inc. to Sealy Incorporated, Chicago, Ill.	704E	635
No. 337—Letter dated June 29, 1953 from J. R. Lawrence of Sealy, Incorporated to Mr. J. V. Moffitt, Jr. of Sealy of the Carolinas, Lexington, N.C.	705E	636
No. 338—Letter dated July 9, 1953 from H. B. Fouts of Sealy Mattress Company to Mr. E. H. Bergmann of Sealy, Inc.	706E	637

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 338-A—Letter dated July 8, 1953 from H. B. Fouts of Sealy Mattress Company to Mr. Jules Shapiro of Central Mattress Company, Omaha, Nebraska	707E	638
No. 339—Letter dated July 13, 1953 from Edgar C. Haas of Slumber Products Corporation to Sealy, Incorporated, Chicago, Ill.	708E	640
No. 342—Letter dated September 16, 1953 from J. R. Lawrence of Sealy, Incorporated to Mr. Edgar Haas of Sealy Mattress Company, Memphis, Tenn.	709E	641
No. 343—Letter dated September 29, 1953 from Robert B. Conover of Slumber Products Corporation to Mr. J. R. Lawrence of Sealy, Incorporated, Chicago, Ill.	710E	642
No. 344—Letter dated October 13, 1953 from E. H. Bergmann of Sealy, Incorporated to Mr. Robert B. Conover of Sealy Mattress Company, Memphis, Tenn.	711E	643
No. 345—Letter dated July 23, 1953 from E. H. Bergmann to Mr. J. R. Lawrence with an enclosure of memorandum dated July 10, 1953 from J. R. Lawrence to E. H. Bergmann.	712E	644
No. 346—Letter dated October 9, 1953 from C. B. McGillivray of Sealy Mattress Company to Mr. Marcus Haas of Sealy Mattress Company, Memphis, Tenn.	714E	646
No. 347—Letter dated January 25, 1954 from E. H. Bergmann of Sealy, Incorporated to Mr. Sidney Sutherland of Sealy Mattress Company, Richmond, Va.	716E	648
No. 348—Letter dated January 27, 1954 from Sidney Sutherland of Sealy Mattress Company to Mr. E. H. Bergmann of Sealy, Incorporated, Cleveland, Ohio	717E	649
No. 349—Letter dated January 27, 1954 from Sidney Sutherland of Sealy Mattress Company to Mr. Joseph Rudick of Sealy Mattress Company, Baltimore, Md.	718E	651
No. 350—Letter dated January 27, 1953 from Joseph Rudick of Sealy Mattress Company to Mr. Sidney Sutherland of Sealy Mattress Company, Richmond, Va.	719E	652

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 355—Letter dated January 28, 1954 from Joseph Rudick of Sealy Mattress Company to Mr. Irving Fisher of Sealy Mattress Company, Chester, Pa.	720E	653
No. 356—Letter dated February 22, 1954 from Irving L. Fisher of Sealy Mattress Company of Philadelphia to Mr. Joseph Rudick of Sealy Mattress Company, Baltimore, Md.	721E	654
No. 357—Letter dated June 4, 1954 from J. R. Rudick of Sealy Mattress Company to Mr. Earl H. Bergmann, Sealy Incorporated, Chicago, Ill.	722E	655
No. 358—Letter dated June 10, 1954 from E. H. Bergmann of Sealy, Incorporated to Mr. J. R. Rudick of Sealy Mattress Co., Baltimore, Md.	723E	656
No. 359—Letter dated June 15, 1954 from J. R. Rudick of Sealy Mattress Company to Mr. Irving L. Fisher, Chester, Pa.	724E	657
No. 360—Letter dated July 14, 1954 from E. H. Bergmann of Sealy, Incorporated to Mr. Irving L. Fisher of Sealy Mattress Co., Chester, Pa.	725E	658
No. 361—Letter dated July 22, 1954 from Irving L. Fisher of Sealy Mattress Company of Philadelphia to Mr. Earl Bergmann of Sealy, Incorporated, Cleveland, Ohio.	726E	659
No. 364—Letter dated October 4, 1954 from J. R. Lawrence of Sealy, Incorporated to Mr. Louis Haas of Sealy Mattress Company, Ft. Worth, Texas.	727E	661
No. 366—Letter dated October 19, 1954 from J. R. Lawrence of Sealy, Incorporated to Mr. R. S. Rogers of Sealy Mattress Company, Brenham, Texas.	728E	662
No. 367—Letter dated October 21, 1954 from R. S. Rogers of Sealy Mattress Company to Mr. Roger Lawrence of Sealy, Incorporated, Chicago, Illinois.	729E	663
No. 372—Letter dated April 18, 1955 from E. H. Bergmann of Sealy, Incorporated to Mr. Ernest M. Wuliger of Sealy Mattress Company, Cleveland, Ohio.	730E	664
No. 373—Letter dated April 28, 1955 from E. H. Bergmann of Sealy, Incorporated to Mr. Ernest M. Wuliger of Sealy Mattress Company, Cleveland, Ohio.	731E	665

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 374—Letter dated September 16, 1955 from Ross S. Rosenberg of Sealy Mattress Company to Mr. Earl H. Bergmann of Sealy, Inc., Chicago, Ill.	732E	666
No. 375—Letter dated September 19, 1955 from E. H. Bergmann of Sealy, Incorporated to Mr. Ross S. Rosenberg of Sealy Mattress Company, St. Paul, Minn.	734E	668
No. 376—Letter dated September 22, 1955 from E. H. Bergmann of Sealy, Incorporated to Mr. H. B. Fouts of Sealy Mattress Company, Des Moines, Iowa	736E	670
No. 377—Letter dated September 23, 1955 from H. B. Fouts of Sealy Mattress Company to Mr. E. H. Bergmann of Sealy, Inc., Chicago, Illinois	737E	671
No. 378—Letter dated October 3, 1955 from E. H. Bergmann of Sealy, Incorporated to Mr. H. B. Fouts of Sealy Mattress Company, Des Moines, Iowa	739E	673
No. 379—Letter dated October 12, 1955 from E. H. Bergmann of Sealy, Incorporated to Mr. J. L. Metcalfe of Sealy Mattress Company, Bluefield, Va. and Mr. Wm. A. Edie of Sealy Mattress Company, Louisville, Ky.	740E	674
No. 380—Letter dated October 14, 1955 from William A. Edie of Sealy Mattress Co. to Mr. E. H. Bergmann of Sealy, Inc., Chicago, Ill.	741E	675
No. 381—Letter dated October 21, 1955 from William A. Edie of Sealy Mattress Co. to Mr. Earl Bergmann of Sealy, Inc., Chicago, Ill.	742E	676
No. 382—Letter dated October 11, 1956 from E. H. Bergmann of Sealy, Incorporated to Mr. E. M. Wuliger of Sealy Mattress Company, Cleveland, Ohio	743E	677
No. 383—Letter dated May 11, 1956 from E. H. Bergmann of Sealy, Incorporated to Mr. Louis J. Gross of Sealy Mattress Company, Rochester, N.Y.	745E	679
No. 384—Letter dated May 23, 1956 from E. Carter Logan of Sealy Mattress Co. to Mr. E. H. Bergmann of Sealy, Inc., Chicago, Ill.	747E	681
No. 385—Letter dated June 4, 1956 from E. H. Bergmann of Sealy, Incorporated to Mr. E. C. Logan of Sealy Mattress Company, Louisville, Ky.	749E	683

Record from the United States District Court for the
Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 386—Letter dated June 8, 1956 from Edgar C. Haas Sr. of Sealy Southeast to Mr. E. H. Bergmann of Sealy, Inc., Chicago, Illinois.....	760E	684
No. 387—Letter of June 12, 1956 from E. H. Bergmann of Sealy Incorporated to Mr. Edgar C. Haas Sr., of Sealy Mattress Company.....	761E	685
No. 388—Letter dated June 25, 1956 from E. H. Bergmann of Sealy, Incorporated to Mr. Joseph F. Haas, Atlanta, Ga.....	762E	686
No. 389—Letter dated August 27, 1956 from J. V. Moffitt, Jr. of Sealy of the Carolinas to Mr. E. H. Bergmann of Sealy, Incorporated, Chicago, Ill.....	763E	687
No. 390—Letter dated August 29, 1956 from E. H. Bergmann of Sealy, Incorporated to Mr. J. V. Moffitt, Jr. of Sealy Mattress Company, Lexington, N.C.....	765E	689
No. 391—Letter dated August 29, 1956 from E. H. Bergmann of Sealy, Incorporated to Mr. J. R. Rudick of Sealy Mattress Company, Baltimore, Md.....	766E	690
No. 392—Letter dated November 23, 1956 from J. V. Moffitt, Jr. of Sealy of the Carolinas, Inc. to Mr. E. H. Bergmann of Sealy, Inc., Chicago, Ill.....	767E	691
No. 393—Letter dated November 27, 1956 from E. H. Bergmann of Sealy, Incorporated to Mr. J. V. Moffitt, Jr. of Sealy Mattress Co., Lexington, N.C.....	770E	694
No. 394—Letter dated November 27, 1956 from E. H. Bergmann of Sealy, Incorporated to Mr. Joe Rudick of Sealy Mattress Co., Baltimore, Md.....	772E	695
No. 395—Inter-Factory Correspondence of Sealy Company of the Southeast dated November 12, 1943 from J. R. Haas to Mr. W. J. Craig.....	774E	697
No. 396—Inter-Factory Correspondence of Sealy Company of the Southeast dated November 8, 1943 from J. R. Haas to Mr. W. J. Craig.....	775E	698
No. 397—Letter dated July 31, 1944 from Herbert H. Neilson of Sealy Mattress Company to Sealy Mattress Company, Pittsburgh, Pa.....	776E	699

Record from the United States District Court for the
Northern District of Illinois, Eastern Division—Con-
tinued.

Government's Exhibits—Continued

	Original	Print
No. 398—Letter dated August 7, 1944 from W. W. Llewellyn, Jr. of Fort Pitt Bedding Company & Sealy Mattress Company to Mr. Herbert Neilson of Sealy Mattress Company, Cincinnati, Ohio	777E	700
No. 399—Letter dated August 9, 1944 from Herbert H. Neilson of Sealy Mattress Company to Mr. John Brody, Sealy Mattress Company, Chicago, Illinois	778E	702
No. 400—Letter dated August 9, 1944 from Herbert H. Neilson of Sealy Mattress Company to the Sealy Mattress Company, Pittsburgh, Pa.	779E	703
No. 401—Letter dated September 23, 1944 from J. M. Brody, Jr. of Sealy, Inc. to Mr. Herbert H. Neilson of Sealy Mattress Co., Cincinnati, Ohio	780E	704
No. 402—Communication dated September 23, 1944 from J. M. Brody, Jr. to Mr. J. R. Haas, "Ohio Boundary Line of Sealy at Cincinnati and Pittsburgh"	781E	706
No. 403—Letter dated September 23, 1944 from Sealy, Inc. to Mr. W. W. Llewellyn, Jr. of Sealy Mattress Co., Pittsburgh, Pa.	782E	707
No. 404—Letter dated September 28, 1944 from W. J. Craig of Sealy, Incorporated to Mr. J. R. Haas	783E	709
No. 409—Letter dated September 16, 1949 from J. R. Lawrence of Sealy, Incorporated to Sealy Mattress Company, Cleveland, Ohio	784E	710
No. 410—Letter dated May 27, 1950 from Ben Rosenfeld of Sealy Mattress Company to Mr. Earl H. Bergmann of Sealy Mattress Company, Cleveland, Ohio	785E	711
No. 411—Letter dated November 16, 1951 from E. H. Bergmann of Sealy, Incorporated to Sealy Mattress Company, Allston, Mass.	787E	713
No. 412—Letter dated January 8, 1952 from E. H. Bergmann of Sealy, Incorporated to Sealy Mattress Company, Allston, Mass.	788E	714
No. 413—Letter dated July 24, 1952 from J. J. Willens, Sealy Mattress Co. of Southern California to E. H. Bergmann, Sealy, Inc., Cleveland, Ohio	789E	715

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 413-A—Letter dated July 29, 1952 from E. H. Bergmann, Sealy, Inc. to Sealy Mattress Co., Chicago, Ill.	792E	718
No. 413-B—Letter dated August 26, 1952 from E. H. Bergmann, Sealy, Inc. to Sealy Mattress Co., Los Angeles, Calif.	793E	719
No. 414—Letter dated December 8, 1952 from E. H. Bergmann, Sealy, Inc. to Sealy Mattress Co., Chicago, Ill.	794E	720
No. 415—Letter dated March 31, 1953 from E. H. Bergmann, Sealy, Inc. to M. A. Kaplan, Sealy Mattress Co., Chicago, Ill.	795E	721
No. 415-A—Telegram dated May 11, 1953 from E. H. Bergmann, Sealy, Inc. to Harry B. Forbes, Sealy Mattress Co., Louisville, Ky.	797E	723
No. 415-B—Telegram dated May 11, 1953 from E. H. Bergmann, Sealy, Inc., to M. A. Kaplan, Sealy Mattress Co., Chicago, Ill.	798E	723
No. 416—Memorandum dated May 12, 1953 from R. S. Logan to Mr. Bergmann.	799E	724
No. 417—Letter from H. L. Forbes, Logan Co., Louisville, Ky. to E. H. Bergmann, Sealy, Inc. dated May 12, 1953.	800E	724
No. 417-A—Letter dated May 13, 1953 from M. A. Kaplan, Sealy Mattress Co., Chicago, Illinois to E. H. Bergmann, Sealy, Inc., Cleveland, Ohio.	802E	726
No. 418—Letter dated May 15, 1953 from M. A. Kaplan, Sealy Mattress Co., Chicago, Ill. to E. H. Bergmann, Sealy, Inc., Cleveland, Ohio.	804E	728
No. 419—Letter dated May 20, 1953 from Sealy, Inc. to M. A. Kaplan, Sealy Mattress Co., Chicago, Ill.	806E	730
No. 420—Letter dated May 19, 1953 from E. H. Bergmann to H. M. Forbes, Sealy Mattress Co., Louisville, Ky.	808E	732
No. 421—Letter dated May 20, 1953 from E. H. Bergmann to H. L. Forbes, Sealy Mattress Co., Louisville, Ky.	809E	733
No. 422—Memorandum from J. R. Lawrence to E. H. Bergmann dated January 14, 1954.	811E	734
No. 423—Letter dated January 26, 1954 from R. B. Swearingen, Logan Co. to M. A. Kaplan, Sealy Mattress Co., Chicago, Illinois.	812E	736
No. 424—Letter dated January 26, 1954 from R. B. Swearingen, Logan Co. to J. R. Lawrence, Sealy, Inc., Chicago, Ill.	813E	737

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 425—Letter dated January 26, 1954 from R. B. Swearingen, Logan Co., to Sealy, Inc., Cleveland, Ohio.....	814E	738
No. 426—Letter dated January 28, 1954 from C. B. McGillivray, Sealy, to R. B. Swearingen, Sealy Mattress, Louisville, Ky.	815E	739
No. 427—Telegram dated February 5, 1954 from Earl Bergmann, Sealy, Inc., to M. A. Kaplan, Sealy, Chicago, and R. B. Swearingen, Sealy, Louisville, Ky.	816E	740
No. 428—Telegram dated February 8, 1954 from R. B. Swearingen, Logan Co., to E. H. Bergmann, Sealy, Inc.	817E	740
No. 429—Letter dated February 5, 1954 from E. H. Bergmann, Sealy, Inc. to M. A. Kaplan, Sealy, Chicago and R. B. Swearingen, Sealy, Louisville, Ky.	818E	741
No. 430—Letter dated March 15, 1954 from E. H. Bergmann, Sealy, Inc. to C. B. McGillivray, Sealy, Chicago, Ill.	820E	743
No. 431—Letter dated February 16, 1954 from E. H. Bergmann, Sealy, Inc. to M. A. Kaplan, Sealy, Chicago and R. B. Swearingen, Sealy, Louisville, Ky.	821E	744
No. 432—Agreement dated April 2, 1954 between Sealy Mattress of Chicago and Sealy Mattress of Louisville re Persons Furniture & Music Co. of Indianapolis.....	823E	746
No. 433—Letter dated March 22, 1954 from E. H. Bergmann, Sealy, Inc. to C. B. McGillivray, Sealy, Chicago, Ill.	824E	748
No. 434—Letter dated March 25, 1954 from R. B. Swearingen, Sealy, Louisville to E. H. Bergmann, Sealy, Inc., Cleveland, Ohio.....	825E	749
No. 435—Letter dated April 2, 1954 from C. B. McGillivray, Sealy, Chicago, Illinois to R. B. Swearingen, Sealy, Louisville, Ky.	827E	751
No. 436—Letter dated April 8, 1954 from R. L. Howard, Logan Co. to Earl Bergmann, Sealy, Inc., Cleveland, Ohio.....	829E	753
No. 437—Letter dated April 19, 1954 from E. H. Bergmann, Sealy, Inc. to R. L. Howard, Sealy, Louisville, Ky.	832E	756
No. 438—Letter dated February 14, 1955 from Wm. A. Eddie, Louisville, Ky. to C. B. McGillivray, Sealy, Chicago, Ill.	833E	757

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 439—Letter dated February 15, 1955 from C. B. McGillivray, Chicago, Ill. to Bill Edie, Sealy, Louisville, Ky.	834E	758
No. 440—Letter dated February 16, 1955 from E. H. Bergmann, Sealy, to Wm. A. Edie, Sealy, Louisville, Ky. and C. B. McGillivray, Sealy, Chicago, Ill.	835E	759
No. 441—Letter dated February 16, 1955 from E. H. Bergmann, Sealy, to C. B. McGillivray, Sealy, Chicago, Ill. and Wm. A. Edie, Sealy, Louisville, Ky.	836E	760
No. 442—Letter dated February 21, 1955 from Wm. A. Edie, Sealy, to C. B. McGillivray, Sealy, Chicago, Ill.	837E	761
No. 443—Letter dated February 24, 1955 from C. B. McGillivray, Sealy, to Wm. A. Edie, Sealy, Louisville, Ky.	838E	762
No. 444—Letter dated February 27, 1955 from W. A. Edie, Sealy, Louisville, Ky. to Earl Bergmann, Cleveland, Ohio with attachments	839E	763
No. 445—Telegram dated March 2, 1955 from Earl Bergmann, Sealy, to C. B. McGillivray, Sealy, Chicago, Ill.	843E	769
No. 446—Letter dated March 2, 1955 from C. B. McGillivray, Sealy, Chicago, Ill. to Earl Bergmann, Sealy, Chicago, Ill.	844E	769
No. 447—Letter dated April 11, 1955 from C. B. McGillivray, Sealy, to Wm. A. Edie, Sealy, Louisville, Ky.	846E	771
No. 447-A—Agreement dated January 1, 1955 between Sealy of Chicago and Sealy of Louisville, Ky.	847E	772
No. 448—Letter dated April 29, 1955 from Wm. A. Edie, Sealy, to Earl Bergmann, Sealy, Chicago, Ill.	848E	773
No. 449—Letter dated April 29, 1955 from Wm. A. Edie, Sealy, to C. B. McGillivray, Sealy, Chicago, Ill.	849E	774
No. 450—Letter dated June 8, 1955 from Wm. A. Edie, Sealy, to Earl Bergmann, Sealy, Chicago, Ill.	850E	775
No. 451—Letter dated August 3, 1955 from E. H. Bergmann, Sealy to E. C. Logan, Sealy, Louisville, Ky.	851E	776

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 452—Letter dated January 11, 1956 from Robert L. Howard, Controller to Ray Garland, Pearsons, Chicago, Ill.	854E	778
No. 453—Letter dated October 17, 1956 from Fielden Woodward, Woodward, Hobson & Fulton, Louisville, Ky. to E. H. Bergmann, Sealy, Inc.	855E	779
No. 454—Letter dated October 29, 1956 from E. H. Bergmann, Sealy, Inc. to M. A. Kaplan, Sealy, Chicago, Ill.	858E	782
No. 455—Letter dated November 8, 1956 from E. C. Logan, Sealy, Louisville to E. H. Bergmann, Sealy, Inc., Chicago, Ill.	859E	783
No. 456—Letter dated March 12, 1953 from J. R. Lawrence, Sealy, Inc. to H. L. Forbes, Sealy, Louisville, Ky.	861E	785
No. 457—Memorandum from J. R. Lawrence to E. H. Bergmann, dated April 14, 1953	862E	786
No. 458—Letter dated October 14, 1953 from C. B. McGillivray, Sealy, Chicago to E. H. Bergmann, Sealy, Inc., Cleveland, Ohio	863E	787
No. 459—Letter from E. H. Bergmann, Sealy, Inc. to E. M. Wuliger, Sealy, Cleveland, Ohio, dated December 24, 1953	865E	789
No. 460—Letter from R. G. Culp, Sealy, Pittsburgh, to E. H. Bergmann, Sealy, Inc., Cleveland, Ohio	866E	790
No. 461—Letter dated January 12, 1954 from E. H. Bergmann, Sealy, Inc. to Sealy of Pittsburgh	867E	792
No. 461-A—Letter dated May 18, 1954 from E. H. Bergmann, Sealy, Inc. to Max Lewis, Sealy, Paterson, N.J.	869E	793
No. 461-B—Letter from M. Lewis, Sealy, Paterson, N.J. to E. H. Bergmann, Sealy, Inc., dated May 20, 1954	870E	794
No. 462—Letter dated July 19, 1954 from Morris A. Kaplan, Sealy, Chicago to Marcus Haas, Sealy, Memphis, Tenn.	872E	795
No. 463—Letter dated July 21, 1954 from M. L. Haas, Sealy Company of the Southeast to Sealy, Chicago, Ill.	873E	796
No. 464—Letter dated July 26, 1954 from Morris A. Kaplan, Sealy, Chicago, Ill. to H. N. Ryden, Sealy, Des Moines, Iowa	875E	798

Record from the United States District Court for the
Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 465—Letter dated August 3, 1954 from H. N. Ryden, Sealy, Des Moines to Morris A. Kaplan, Sealy, Chicago, Ill.	877E	801
No. 466—Letter dated August 10, 1954 from E. H. Bergmann, Sealy, Inc. to M. A. Kaplan, Chicago; Harry Ryden, Des Moines; Marcus Haas, Memphis; and P. D. Brown, Detroit	878E	802
No. 467—Letter dated August 12, 1954 from H. N. Ryden, Sealy, Des Moines to Earl H. Bergmann, Sealy, Inc.	880E	804
No. 468—Letter dated August 13, 1954 from C. B. McGillivray, Sealy, Chicago to E. H. Bergmann, Sealy, Inc.	881E	805
No. 469—Letter dated August 17, 1954 from E. H. Bergmann, Sealy, Inc. to Harry Ryden, Sealy, Des Moines	882E	806
No. 470—Letter dated August 19, 1954 from M. L. Haas, Sealy, Memphis to Sealy, Inc., Cleveland	883E	807
No. 471—Letter dated August 17, 1954 from E. H. Bergmann, Sealy, Inc. to Ralph Swearingen, Sealy, Louisville	884E	808
No. 472—Letter dated September 7, 1954 from E. H. Bergmann, Sealy, Inc. to Ralph Swearingen, Sealy, Louisville, Ky.	885E	809
No. 473—Letter dated September 9, 1954 from "Leon", Sealy, Louisville to Ralph Swearingen	886E	810
No. 474—Letter dated September 13, 1954 from R. B. Swearingen, Sealy, Louisville to E. H. Bergmann, Sealy, Inc.	887E	812
No. 475—Letter dated September 27, 1954 from E. H. Bergmann, Sealy, Inc. to Ralph B. Swearingen, Sealy, Louisville	888E	814
No. 476—Letter dated August 24, 1954 from J. R. Rudick, Sealy, Baltimore to Earl Bergmann, Sealy, Inc. with attached letter dated August 24, 1954 from J. R. Rudick to Eugene Kligman, Sealy, Brooklyn	889E	815
No. 477—Letter dated August 26, 1954 from E. H. Bergmann, Sealy, Inc. to Joseph Rudick, Sealy, Baltimore, Md.	892E	818
No. 478—Letter dated September 15, 1954 from M. L. Haas, Sealy, Memphis to Louis G. Haas, Sealy of the Southwest	893E	819
No. 479—Letter dated September 27, 1954 from E. H. Bergmann, Sealy, Inc. to C. McGillivray, Sealy, Chicago, Ill.	894E	820

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 480—Letter dated December 28, 1954 from H. F. Kaufman, Sealy, Pittsburgh to E. H. Bergmann, Sealy, Inc.	896E	822
No. 481—Letter dated December 30, 1954 from Ernest M. Wuliger, Sealy, Cleveland, to H. F. Kaufman, Sealy, Pittsburgh	897E	823
No. 483—Letter dated January 7, 1955 from E. H. Bergmann, Sealy, Inc. to E. M. Wuliger, Sealy, Cleveland	898E	824
No. 484—Letter dated January 7, 1954 from E. H. Bergmann, Sealy, Inc. to H. F. Kaufman, Sealy, Pittsburgh	899E	825
No. 485—Letter dated January 10, 1955 from (?) to Ernest	900E	826
No. 486—Letter dated January 13, 1955 from Ernest M. Wuliger, Sealy, Cleveland to E. H. Bergmann, Sealy, Inc.	901E	828
No. 487—Letter dated January 14, 1955 from E. H. Bergmann, Sealy, Inc. to Ernest M. Wuliger, Sealy, Cleveland, Ohio	902E	829
No. 488—Letter dated January 17, 1955 from Ernest M. Wuliger, Ohio Mattress Co., Cleveland to E. H. Bergmann, Sealy, Inc., Cleveland	904E	831
No. 489—Letter dated February 17, 1955 from H. F. Kaufman, Sealy, Pittsburgh to E. H. Bergmann, Sealy, Inc.	905E	833
No. 490—Letter dated March 11, 1955 from E. H. Bergmann, Sealy, Inc. to E. M. Wuliger, Sealy, Cleveland	907E	835
No. 491—Memorandum dated March 17, 1955 from Kay K. Kaplan to Mr. Bergmann	908E	836
No. 492—Letter dated March 17, 1955 from E. H. Bergmann, Sealy, Inc. to H. F. Kaufman, Sealy, Pittsburgh	910E	837
No. 493—Letter dated February 10, 1955 from C. B. McGillivray to Bill Edie, Logan Company, Louisville, Ky.	911E	838
No. 494—Letter dated June 20, 1955 from Roy B. Unger, Sealy, Cleveland to E. H. Bergmann, Sealy, Inc., Chicago	912E	839
No. 495—Letter dated July 6, 1955 from E. H. Bergmann, Sealy, Inc. to Roy Unger, Sealy, Cleveland	913E	840
No. 496—Letter dated August 9, 1955 from E. H. Bergmann, Sealy, Inc. to Roy Unger, Sealy, Cleveland, and J. DiSalvo, Sealy, Pittsburgh	914E	841

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued	Original	Print
No. 497—Letter dated July 25, 1955 from D. B. Embree, Sealy, Memphis to E. H. Bergmann, Sealy, Inc., Chicago.....	915E	842
No. 498—Letter dated August 3, 1955 from E. H. Bergmann, Sealy, Inc. to Mrs. D. B. Embree, Sealy, Memphis.....	916E	843
No. 499—Letter dated August 3, 1955 from E. H. Bergmann, Sealy, Inc. to Morris A. Kaplan, Sealy, Chicago.....	917E	844
No. 500—Letter dated August 8, 1955 from Morris A. Kaplan, Sealy, Chicago to E. H. Bergmann, Sealy, Inc.	918E	845
No. 501—Letter dated August 11, 1955 from E. H. Bergmann, Sealy, Inc. to Mrs. D. B. Embree, Sealy, Memphis.....	919E	846
No. 502—Letter dated August 11, 1955 from E. H. Bergmann, Sealy, Inc. to Morris A. Kaplan, Sealy, Chicago.....	920E	847
No. 503—Letter dated September 20, 1955 from E. H. Bergmann, Sealy, Inc. to Mrs. D. B. Embree, Sealy, Memphis.....	921E	848
No. 504—Letter dated September 22, 1955 from D. B. Embree, Sealy, Memphis, to E. H. Bergmann, Sealy, Inc., Chicago.....	922E	849
No. 505—Letter dated October 15, 1955 from D. B. Embree, Sealy, Memphis to E. H. Bergmann, Sealy, Inc. with attached catalog sheet of Harrison Wholesale Company.....	923E	850
No. 506—Letter dated October 18, 1955 from E. H. Bergmann, Sealy, Inc. to D. B. Embree, Sealy, Memphis.....	925E	853
No. 507—Letter dated August 18, 1955 from A. Eisenberg, Sealy, New York to Max Lewis, Sealy, Paterson, N.J.	926E	854
No. 508—Letter dated August 24, 1955 from E. H. Bergmann, Sealy, Inc. to Eugene Kligman, Brooklyn.....	927E	855
No. 509—Letter dated August 29, 1955 from Eugene Kligman, Sealy, New York to Earl Bergmann, Sealy, Inc.	928E	856
No. 510—Letter dated September 19, 1955 from E. H. Bergmann, Sealy, Inc. to Eugene Kligman, Sealy, Brooklyn.....	929E	857

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued	Original	Print
No. 511—Letter dated November 2, 1955 from Eugene Kligman, Sealy, Brooklyn to Earl Bergmann, Sealy, Inc. Chicago	930E	858
No. 512—Letter dated October 26, 1955 from Fred Weintraub, Darling Distributing Corp., N.Y. to Gene Kligman, Sealy, Brooklyn	932E	860
No. 513—Letter dated September 7, 1955 from J. R. Rudick, Sealy, Baltimore to E. H. Bergmann, Sealy, Inc., Chicago, Ill.	933E	861
No. 514—Letter dated May 21, 1956 from J. R. Rudick, Sealy, Baltimore to J. V. Moffitt, Jr., Sealy, Lexington, N.C.	935E	863
No. 515—Letter dated April 18, 1956 from E. H. Bergmann, Sealy, Inc. to Mrs. D. B. Embree, Sealy, Memphis	936E	864
No. 516—Letter dated April 13, 1956 from D. B. Embree, Sealy, Memphis to E. H. Bergmann, Sealy, Inc., Chicago, Ill.	938E	866
No. 517—Letter dated September 26, 1955 from Sidney Sutherland, Sealy, Richmond, Va. to Joe Moffitt, Sealy, Lexington, N.C.	941E	869
No. 518—Letter dated October 14, 1955 from J. V. Moffitt, Jr., Sealy, Lexington, N.C. to Sidney Sutherland, Sealy, Richmond, Va.	942E	870
No. 519—Letter dated October 18, 1955 from Sidney Sutherland, Sealy, Richmond to E. H. Bergmann, Sealy, Inc., Chicago, Ill.	944E	872
No. 520—Letter dated October 18, 1955 from Sidney Sutherland, Sealy, Richmond to J. V. Moffitt, Jr., Sealy, Lexington, N.C.	945E	873
No. 521—Letter dated July 5, 1956 from Joseph R. Rudick, Sealy, Baltimore to E. H. Bergmann, Sealy, Inc.	946E	874
No. 522—Letter dated February 29, 1956 from D. B. Embree, Sealy, Memphis to E. H. Bergmann, Sealy, Inc., Chicago, Ill.	948E	876
No. 523—Letter dated March 2, 1956 from E. H. Bergmann, Sealy, Inc. to Mrs. D. B. Embree, Sealy, Memphis	949E	877
No. 524—Letter dated March 2, 1956 from E. H. Bergmann, Sealy, Inc. to William Edie, Sealy, Louisville	950E	878
No. 525—Letter dated March 12, 1956 from Wm. A. Edie, Sealy, Louisville to Earl Bergmann, Sealy, Inc., Chicago, Ill.	951E	879

Record from the United States District Court for the
Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 526—Letter dated May 7, 1956 from Wm. A. Edie, Sealy, Louisville to Earl Bergmann, Sealy, Inc., Chicago, Ill.	952E	880
No. 527—Letter dated May 8, 1956 from E. H. Bergmann, Sealy, Inc. to William Edie, Sealy, Louisville	953E	881
No. 528—Letter dated December 4, 1956 from Edgar C. Haas, Jr., Sealy, Memphis to E. H. Bergmann, Sealy, Inc., Chicago, Ill.	954E	882
No. 529—Letter dated December 17, 1956 from E. H. Bergmann, Sealy, Inc. to Edgar C. Haas, Jr., Sealy, Memphis	955E	883
No. 530—Letter dated December 18, 1956 from E. H. Bergmann, Sealy, Inc. to J. L. Metcalfe, Sealy, Bluefield, Va.	956E	884
No. 531—Letter dated December 26, 1956 from J. L. Metcalfe, Sealy, Bluefield, Va. to E. H. Bergmann, Sealy, Inc.	957E	885
No. 532—Letter dated December 28, 1956 from E. H. Bergmann, Sealy, Inc. to Edgar Haas, Jr., Sealy, Memphis, Tenn.	958E	886
No. 533—Letter dated December 28, 1956 from E. H. Bergmann, Sealy, Inc. to R. G. Culp, Sealy, Pittsburgh	959E	887
No. 534—Letter dated December 31, 1956 from R. G. Culp, Sealy, Pittsburgh to E. H. Bergmann, Sealy, Inc.	960E	888
No. 601—Minutes of the Sealy Board of Directors Meeting, held at Pittsburgh, Pa., November 4, 1938 (excerpts)	961E	889
No. 638—Minutes of Reconvened Meeting of Sealy, Inc. Board of Directors, held at San Souci Hotel, Miami Beach, Florida, April 7, 1954 (excerpts)	968E	890
No. 662—Minutes of the Advertising & Merchandising Committee Meeting in Chicago, Ill., December 11, 1956 (excerpts)	972E	891
No. 664—Minutes of the Advertising & Merchandising Committee Meeting in New York, January 26, 1957 (excerpts)	978E	896
No. 741—Bulletin from J. R. Lawrence to all Sealy Licensees. Subject: Resume of royalty payments. Dated May 29, 1952 (excerpts)	984E	900

Record from the United States District Court for the
Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued	Original	Print
No. 753—Bulletin from E. H. Bergmann to all Sealy Licensees. Subject: Programs of procedure approved and adopted by the Board of Directors. Dated May 28, 1954.....	986E	901
No. 777—Bulletin from E. H. Bergmann to all Sealy plants. Subject: Specification and cost committees for 1956. Dated February 17, 1956.....	989E	904
No. 816—Letter from Ernest M. Wuliger to E. H. Bergmann. Dated February 11, 1953.....	990E	905
No. 817—Letter from H. F. Krafman to E. H. Bergmann. Dated February 18, 1953.....	991E	906
No. 887—Letter from J. V. Moffitt, Jr. to E. H. Bergmann. Dated May 4, 1956.....	992E	908
No. 878—Letter from E. H. Bergmann to J. V. Moffitt, Jr., dated May 8, 1956.....	993E	909
No. 932—Minutes of Executive Committee Meeting, held William Penn Hotel, Pittsburgh, Pa., December 14, 1936 (excerpts).....	994E	910
No. 933—Minutes of Executive Committee Meeting, held Stevens Hotel, Chicago, Ill., January 7, 1937 (excerpts).....	999E	913
No. 934—Minutes of Board of Directors Meeting, held Stevens Hotel, Chicago, Ill., January 8, 1937 (excerpts).....	1002E	916
No. 937—Minutes of the Board of Directors Meeting, held Palmer House, Chicago, Ill., June 30 and July 1, 1937 (excerpts).....	1004E	916
No. 938—Minutes of the Stockholders Meeting of Sealy, Inc., held Palmer House, Chicago, Ill., July 2 and 3, 1937 (excerpts).....	1006E	917
No. 939—Alphabetical list of Stockholders, December 6, 1937 and Sealy Annual Meeting, held Palmer House, Chicago, Ill. Board of Directors, December 7, 1937 (excerpts).....	1008E	918
No. 940—Sealy Stockholders Meeting, held Palmer House, Chicago, Ill., December 7, 1937 (excerpts).....	1012E	920
No. 941—Minutes of Executive Committee Meeting, held Hotel George Washington, W. Palm Beach, Fla., February 21 and 22, 1938 (excerpts).....	1022E	923
No. 946—Minutes of the Semi-Annual Meeting of Members and Stockholders of Sealy, Incorporator, held Pursuant to Notices Duly Mailed, at the Congress Hotel, Chicago, Illinois, July 2, 1941 (excerpts).....	1028E	924

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Northern District of Illinois, Eastern Division—Con-
tinued

Government's Exhibits—Continued

	Original	Print
No. 950—Proceedings of Licensee Meeting Sealy, Inc., held Palmer House, Chicago, Illinois, November 28, 1942 (excerpts).....	1029E	925
No. 951—Minutes of the Meeting of the Licensees of Sealy Incorporated, held at the Chicagoan Hotel, December 4, 1943.....	1031E	926
No. 956—Minutes of the Meeting of the Board of Directors of Sealy, Incorporated, held Drake Hotel, Chicago, Ill., November 23, 1945 (excerpts).....	1033E	928
No. 957—Minutes of the Meeting of the Licensees of Sealy, Incorporated, held Drake Hotel, Chicago, Ill., November 25, 1945 (excerpts).....	1035E	928
No. 958—List of Stockholders, Sealy, Incorporated, March 9, 1947.....	1037E	929
No. 962—Minutes of the Meeting of the Stockholders of Sealy, Incorporated, held Stevens Hotel, Chicago, Ill., November 21, 1947 (excerpts).....	1038E	930
No. 964—Minutes of Meeting of Licensees of Sealy, Incorporated, held at Furniture Mart, July 2, 1948 (excerpts).....	1040E	931
No. 970—Minutes of the Board of Directors of Sealy, Incorporated, held Stevens Hotel, Chicago, Ill., November 11, 1950 (excerpts).....	1044E	932
No. 972—Minutes of Sealy Incorporated Board of Directors Meeting, held at the American Furniture Mart, Chicago, Illinois, November 9, 1951 (excerpts).....	1046E	933
No. 973—Minutes of Sealy, Incorporated Stockholders Meeting, held at American Furniture Mart, Chicago, Ill., November 10, 1951.....	1050E	936
No. 974—Minutes of Sealy, Incorporated New Board of Directors Meeting, held at the American Furniture Mart, Chicago, November 10, 1951 (excerpts).....	1051E	938
No. 976—Minutes of Sealy, Incorporated Board of Directors Meeting, held at Conrad Hilton Hotel, Chicago, Ill., November 21, 1952 (excerpts).....	1054E	939
No. 978—Sealy, Incorporated Stockholders List.....	1062E	943
No. 980—List of Sealy, Incorporated Stockholders, September 23, 1955.....	1063E	945
No. 981—By-Laws of Sealy, Incorporated, November 11, 1955.....	1064E	946

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Government's Exhibits—Continued

	Original	Print
No. 985—List of Sealy, Incorporated Stockholders, September 26, 1956.....	1074E	957
No. 991-D—Sealy, Inc.—Officers and Directors, 1956-1957.....	1075E	958
No. 991-E—Sealy, Incorporated 1957 Committees.....	1076E	960
No. 991-F—Names, addresses and position of Sealy, Incorporated Employees, 1951 To-Date.....	1077E	962
No. 991-G—Names, Companies and Locations of Sealy Plants, dated October 26, 1956.....	1079E	965

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No. 991-H—Names and Locations of Sealy, Incorporated Stockholders, by Plants.....	1081E	967
No. 996—Selected pages of Sealy, Incorporated Report on Examination, Year ended June 30, 1956 (excerpts).....	1084E	970
No. 998—Selected pages of Sealy, Incorporated, Report on Examination, Year ended June 30, 1955 (excerpts).....	1090E	974
No. 999—Selected pages of Sealy, Incorporated, Report on Examination, Year ended June 30, 1954 (excerpts).....	1092E	976
No. 999-A—Selected pages of Sealy, Incorporated, Report on Examination, Year ended June 30, 1953 (excerpts).....	1094E	978
No. 1005—Selected pages of Agenda, Sealy, Board of Directors Meeting, April 5-6-7, 1954 (excerpts).....	1097E	980
—1954 Committees, Sealy, Incorporated	1098E	980
No. 1011—Annual Stockholders Meeting, Sealy, Incorporated, November 12, 1954.....	1099E	983
No. 1012—Manufacturer's Contract, dated September 1, 1936 at Pittsburgh, Pa. by Sealy, Incorporated and The Ohio Mattress Co. of Cleveland, Ohio.....	1110E	997
No. 1013—Contract Agreement between Sealy and the Ohio Mattress Co., dated December 1, 1937 at Pittsburgh, Pa.....	1126E	1011
No. 1014—Contract made between Sealy, Incorporated and Made-Wel Bedding Co. Proprietors—Morris Lewis & Samuel Hertz of 43 Aspen St., Passaic, N. J., at Chicago, Ill., May 1, 1941.....	1129E	1013

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 1015—Contract made between Sealy, Incorporated and the Fred G. Hodges Bedding Co. of Reading, Pa. at Pittsburgh, Pa. on August 1, 1938	1145E	1027
No. 1016—Contract made between Sealy, Incorporated and U.S. Bedding Co. of Shelby County, Memphis, Tenn., November 1, 1936, at Pittsburgh, Pa.	1164E	1046
No. 1017—Contract made between Sealy, Incorporated and The Colorado Mattress Mfg. Co., of Denver, Colo., at Pittsburgh, Pa. on September 12, 1936	1201E	1092
No. 1018—Contract made between Sealy, Inc. and Sealy Mattress Co. of Northern California, place of business, Oakland, California, at Pittsburgh, Pa. on December 15, 1937	1222E	1113
No. 1020—Telegram from J. R. Lawrence to I. A. Wiener, dated December 2, 1948	1256E	1153
—Letter from I. A. Wiener to J. R. Lawrence, dated November 29, 1948	1257E	1153
—Letter from J. R. Lawrence to I. A. Wiener, dated November 24, 1948	1258E	1154
—Telegram from L. Ballard to J. R. Lawrence, dated December 8, 1948	1259E	1155
—Telegram from Sealy Mattress, Allston, Mass. to J. R. Lawrence, dated December 8, 1948	1260E	1155
—Letter from J. R. Lawrence to I. A. Wiener, dated December 15, 1948	1261E	1156
—An Agreement made between Eagle Mattress Co., and Sealy, Inc., on May 1, 1946	1262E	1157
No. 1031—Amendment to the Agreement between Sealy, Incorporated and Sealy Mattress Co. of Kansas City, dated October 1947	1270E	1171
No. 1051—Contract between Sealy, Incorporated and Sanitary Bedding Co., a partnership consisting of Ross S. Rosenberg, Mrs. Rebecca Rosenberg, Isadore Segal, Saralee (Mrs. Bernard) Kegan, on September 27, 1948	1273E	1174
No. 1061—Contract between Sealy, Incorporated and U.S. Bedding Co., of Memphis, Tenn., a corporation of Georgia, on July 1, 1950	1284E	1192

Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued

Government's Exhibits—Continued

	Original	Print
No. 1064—Contract between Sealy, Incorporated and David Mfg. Co., of the State of Missouri, with office at Kansas City, Mo., on October 1, 1952	1295E	1211
No. 1065—Contract between Sealy, Incorporated and Peerless Mattress Co., Inc., a corporation of North Carolina, with offices in Lexington, N.C., on November 1, 1952	1314E	1232
No. 1074—Contract between Sealy, Incorporated and Sanitary Bedding Co., a partnership consisting of Ross S. Rosenberg, Bernard M. S. Kegan and Rebeca R. Lichter, on May 15, 1952	1334E	1254
No. 1085—Contract between Sealy, Incorporated and Schmitt & Henry Mfg. Co., of Des Moines, Iowa, whose tradename is Sealy Mattress Co., on September 28, 1948	1353E	1275
No. 1086—Contract between Sealy, Incorporated and Brown Reliable Bedding Co., a corporation of Michigan, on September 1, 1954	1365E	1296
No. 1107—Interrogatories 7, 8 and 9 and answers thereto	1383E	1315
No. 1113—Interrogatories 58 and 62 and answers thereto	1391E	1322
No. 1168—Telegram sent to Marty Rudick from Gloria S. Bennett, U. S. Merchandise Mart, Washington, D.C., dated July 2, 1956	1402E	1332
No. 1169—Letter from Marty Rudick to Mr. Norman Bennett, U. S. Merchandise Mart, Washington, D.C., dated July 27, 1956	1403E	1333
No. 1170—Letter from Norman Bennett to Marty Rudick, Sealy Mattress Co., Baltimore, Md., dated April 21, 1956	1404E	1334
No. 1171—Letter from Marty Rudick to Norman Bennett, dated August 29, 1956	1405E	1335
No. 1172—Letter from Norman Bennett, President to Marty Rudick, dated September 10, 1956	1406E	1336

[fol. 1]

[File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT, NORTH-
ERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

Civil Action No. 60 C 844

Equitable Relief Sought

UNITED STATES OF AMERICA, Plaintiff,

v.

SEALY, INC., Defendant.

COMPLAINT—Filed May 31, 1960.

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the above-named defendant and complains and alleges as follows:

I**Jurisdiction and Venue**

1. This complaint is filed and these proceedings are instituted against the defendant under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U.S.C. § 4, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by defendant, as hereinafter alleged, of Section 1 of the Sherman Act.

[fol. 2] 2. The defendant named herein maintains offices, transacts business and is found within the Northern District of Illinois.

II**The Defendant**

3. Sealy, Inc. (hereinafter referred to as "Sealy") is hereby made a defendant herein. Sealy is a corporation organized and existing under the laws of the State of

Delaware, with its headquarters and principal place of business in Chicago, Illinois. Sealy's stockholders and/or licensees doing business in the United States (hereinafter referred to as "member factories") have been and are independent persons, firms, and corporations engaged in the business of manufacturing mattresses, foundations, combinations and sleepers, as those terms are defined herein.

III

Co-Conspirators

4. During the period of time covered by this complaint, all member factories have participated as co-conspirators with Sealy in the offense hereinafter charged and have performed acts and made statements in furtherance thereof.
3. The acts alleged in this complaint to have been done by Sealy or the co-conspirators were authorized, ordered, or done by the officers, agents, or employees of Sealy or the co-conspirators.

IV

Definitions

6. The term "mattress" as used herein means an item of bedding composed of an outer covering or tick, enclosing [fol. 3] innersprings or a filler of latex, synthetic foam, felt or other materials, or both, designed to be used as a pad for a bed and usually rests upon bedsprings or other foundation or support.

7. The term "foundation" as used herein means an item of bedding, apart from the bedstead, designed to support the mattress and often to provide additional cushioning, commonly but not exclusively composed of an upholstered frame enclosing springs.

8. The term "combination" as used herein means a mattress and a foundation manufactured as a set to match each other and to be sold together.

9. The term "sleeper" as used herein means a sofa bed, studio couch, or Hollywood bed ensemble.

10. The term "Sealy products" is used herein to describe an item of bedding bearing a Sealy label, incorporating

a Sealy patented or exclusive Sealy feature, or styled according to Sealy catalogued items, or which is represented to consumers in any way as being a Sealy item. Sealy products include mattresses, foundations, combinations and sleepers, as hereinabove described.

11. The term "retail store" as used herein means a person, firm, or corporation engaged in the business of selling mattresses, foundations, combinations and sleepers to consumers.

V

Trade and Commerce

12. Sealy presently has approximately 26 member factories located in various cities and States throughout the United States. These member factories are franchised or licensed by the defendant Sealy, to manufacture and sell mattresses, foundations, combinations and sleepers, under the Sealy trade names and trademarks.

13. During the period of time covered by this complaint, member factories in the United States have manufactured mattresses, foundations, combinations and sleepers, many of which have been Sealy products, and have sold and shipped such mattresses, foundations, combinations and sleepers from the respective States in which they were manufactured to retail stores and other purchasers located in other States, for resale to consumers.

14. During the year 1959, the combined sales of the member factories totaled approximately \$48,000,000, a substantial portion of which consisted of sales of Sealy products.

VI

Offense Charged

15. For many years last past and continuing up to and including the date of this complaint, Sealy and the co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in Sealy products in violation of Section 1 of the Sherman Act. Such offense is continuing and will

continue unless the relief hereinafter prayed for is granted. [fol. 5] 16. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among Sealy and the co-conspirators, the substantial terms of which have been that, with respect to Sealy products, they agreed:

- (a) That each member factory will sell Sealy products only within the exclusive marketing territory allocated to it, and will refrain from selling Sealy products outside such exclusive marketing territory;
- (b) to fix uniform suggested retail prices, and to induce retail stores to adhere to such suggested retail prices, for the purpose of fixing and stabilizing the retail prices of Sealy products.

17. In effectuating and carrying out the aforesaid combination and conspiracy, Sealy and the co-conspirators, have done those things which as hereinbefore charged, they combined, conspired and agreed to do.

VII

Effects of the Conspiracy

18. The effects of the combination and conspiracy alleged in this complaint, upon the hereinbefore described interstate trade and commerce have been:

- (a) to eliminate competition among member factories in the sale and distribution of Sealy products;
- (b) to deprive jobbers, retailers and other purchasers of Sealy products of the benefits of free and open [fol. 6] competition among member factories;
- (c) to eliminate price competition among retail stores in the sale of Sealy products;
- (d) to deprive retail customers of the benefits of free and open competition in the sale of Sealy products; and
- (e) to unreasonably restrain interstate trade and commerce in Sealy products.

Prayer

WHEREFORE, Plaintiff prays:

1. That the aforesaid combination and conspiracy in restraint of interstate trade and commerce in Sealy products be adjudged and decreed to be unlawful and in violation of Section 1 of the Sherman Act.
2. That the defendant, its successors, officers, directors, managers, agents and representatives, and all persons acting or claiming to act for or on the behalf of defendant, be perpetually enjoined and restrained from continuing, reviving or renewing the aforesaid combination and conspiracy, and from entering into, maintaining or participating in any contract, agreement, understanding, plan, program or other arrangement having the purpose or effect of continuing, reviving, maintaining or renewing said combination and conspiracy.
3. That the defendant, its members, officers, directors, managers, agents, employees and representatives and their respective successors, assignees and transferees be perpetually enjoined from entering into, adhering to or maintaining any contract, agreement, arrangement, understanding, plan or program to:

[fol. 7] (a) fix, establish or maintain prices to be charged for mattresses, foundations, combinations and sleepers;

(b) recommend, adopt or circulate suggested prices for the sale of mattresses, foundations, combinations and sleepers;

(c) limit the territory within which any member factory may manufacture or sell mattresses, foundations, combinations and sleepers.

4. That the defendant be directed to adopt and enforce a permanent bylaw requiring:

- (a) the expulsion of any member factory who fails to comply with the terms of any final judgment in this case;
- (b) that all future applicants for membership in the

defendant, Sealy, Inc., be required to agree to comply with the terms of any such final judgment as a condition of membership.

5. That the defendant, Sealy, and its member factories be enjoined from imposing or seeking to impose upon wholesalers or retailers to whom mattresses, foundations, combinations or sleepers are sold, any restrictions with respect to the persons to whom, prices at which, and the areas in which such products may be re-sold.

6. That the judgment contain such additional terms and provisions as are necessary and appropriate to provide effective assurance that neither defendant organization itself nor the conditions on which it franchises manufacturers or licenses trademarks, trade names, patents or copyrights are used for anti-competitive purposes or with anti-competitive effects.

[fol. 8] 7. That the defendant be directed to furnish to each of its member factories a copy of any final judgment which may be entered by this Court in this matter.

8. That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

9. That the plaintiff recover the costs of this action.

Dated: May 31, 1960

/s/ Earl A. Jinkinson. /s/ Thomas J. Rooney.
/s/ Harry H. Faris, Attorneys, Department of
Justice, Room 404, United States Courthouse,
Chicago 4, Illinois, Harrison 7-4700

/s/ William P. Rogers, Attorney General. /s/ Robert
A. Bicks, Acting Assistant Attorney General. /s/ Charles
L. Whittinghill. /s/ Paul A. Owens, Attorneys, Depart-
ment of Justice.

[fol. 9] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

Civil Action No. 60 C 844

UNITED STATES OF AMERICA, Plaintiff,

v.

SEALY, INC., Defendant.

ANSWER—Filed August 1, 1960

SEALY, INC., defendant, by its attorneys, for its answer to the complaint herein, states:

1. Admits that the complaint was filed and purports to state a cause of action under the Sherman Act, as alleged in paragraph 1, but denies that defendant has in any manner violated said Act.
2. Admits the allegations of paragraph 2.
3. Admits the allegations of paragraph 3, except that defendant denies the relevancy, accuracy or propriety of the term "member factories" as used by the plaintiff to describe Sealy's licensees.
4. Denies the allegations of paragraphs 4 and 5.
- [fol. 10] 5. Admits the allegations of paragraphs 6, 7, 8 and 9.
6. Admits the allegations of paragraph 10, except that defendant denies the relevancy, accuracy or propriety of the description as a "Sealy product" of an item "which is represented to consumers in any way as being a Sealy item." As used hereinafter, the term "Sealy products" is used to describe items of bedding manufactured by Sealy licensees under specifications issued or approved by Sealy and bearing the Sealy name.
7. Admits the allegations of paragraph 11.
8. Denies the allegations of paragraph 12, except that defendant admits that Sealy has issued licenses to manufacture and sell Sealy products to approximately 30 persons, firms or corporations located in 30 cities in various parts of the United States.
9. Denies the allegations of paragraph 13, except that defendant admits upon information and belief that during

the period covered by the complaint, Sealy licensees have manufactured mattresses, foundations, combinations, sleepers and other products, many of which have been Sealy products, and have sold and shipped the same from the states in which they were manufactured to retail stores and other purchasers located in other states, for resale to consumers.

[fol. 11] 10. Denies the allegations of paragraph 14, except that defendant admits upon information and belief that sales by Sealy licensees of mattresses, foundations, combinations, sleepers and other products during 1959 exceeded \$48,000,000, and that a substantial portion of the same consisted of sales of Sealy products.

11. Denies the allegations of paragraph 15.

12. Denies the allegations of paragraph 16, except that defendant admits that Sealy licensees are licensed to manufacture and sell Sealy products in specified geographical areas.

13. Denies the allegations of paragraph 17.

14. Denies the allegations of paragraph 18, except that defendant admits upon information and belief that Sealy licensees manufacture and sell Sealy products within the geographical areas specified in their respective licenses.

15. As a further answer to the complaint herein, defendant Sealy avers that

a. The provisions of the Sealy licenses and Sealy's administration of its advertising, merchandising and quality control programs, attacked by the complaint herein, are reasonably ancillary to the proper protection and exploitation by Sealy of its trademarks, trade names, patents, processes and manufacturing and merchandising techniques.

[fol. 12] b. The licensing arrangements between Sealy and its licensees are reasonable and necessary in order to enable said licensees (who are by United States Census definition "small businessmen") to manufacture, nationally advertise and sell products of uniform quality under the Sealy trade names and trademarks and thereby to provide effective competition in the bedding industry, and in particular with the well-established, nationally-advertised brands of the corporate manufacturers of bedding; such arrangements are neither designed to nor do they have the effect of unreasonably restraining competition.

c. The licensing arrangements between Sealy and its licensees do not restrict the manufacture and sale by Sealy licensees of non-Sealy bedding (so long as such bedding is not passed off as a "Sealy product"), and defendant avers upon information and belief that many of said licensees do in actual practice manufacture such non-Sealy bedding and sell the same both within and without their licensed territories.

d. The licensing arrangements between Sealy and its licensees benefit the public through improved construction, uniformity in quality, reduced costs, and the additional competition which such arrangements enable Sealy licensees to provide in the bedding industry.

[fol. 13] e. The bedding industry of which Sealy and its licensees are a part is characterized in all parts of the United States by a large number of manufacturers and an even larger number of brands and grades of bedding in numerous price ranges, by vigorous competition among manufacturers for the business of retail stores and among retail stores for consumer trade, and arrangements between Sealy and its licensees have not unreasonably restrained such competition.

f. The relief for which plaintiff prays is contrary to the public interest in that it would tend to destroy the ability of Sealy and its licensees to compete in the bedding industry and would tend to augment the already substantial market positions enjoyed by the corporate manufacturers of nationally-advertised brands of bedding.

Defendant further denies that plaintiff is entitled to all or any part of the relief prayed for in the complaint.

WHEREFORE, defendant, Sealy, Inc., prays that the complaint herein shall be dismissed.

Sealy, Inc., a corporation, Defendant. By /s/ John T. Chadwell. /s/ Richard W. McLaren. /s/ Joseph F. Haas. /s/ Richard S. Rhodes, Its Attorneys

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ruggles
135 South La Salle St. Chicago 3, Illinois. Haas, Holland
& Zinkow First National Bank Bldg. Atlanta 3, Georgia

[fol. 15] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 60 C 844

UNITED STATES OF AMERICA, Plaintiff,

vs.

SEALY, INC., Defendant.

Transcript of Proceedings—December 5, 1963

had in the trial of the above-entitled cause, before the Honorable Richard B. Austin, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, commencing on Thursday, December 5, 1963, at 10:00 o'clock, a.m.

APPEARANCES:

Mr. Earl A. Jinkinson, Chief, Midwest Office, Department of Justice, and Mr. Harry H. Faris, Mr. Howard L. Fink, Mrs. Rachel K. Greenbaum, on behalf of the Government;

Messrs. Chadwell, Keck, Kayser, Ruggles & McLaren, by Mr. Richard W. McLaren, Mr. Richard S. Rhodes, Mr. David L. Auderstrasse, on behalf of the Defendant.

[fol. 16] OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

[fol. 17] The Court: Where is the Serta case?

Mr. Jinkinson: The Serta case, Your Honor, is before Judge Decker.

The Court: Why didn't you try that one first?

Mr. Jinkinson: That is a good question, Your Honor. We have been waiting for either this Court or Judge Decker to act in these matters. You acted more rapidly, Your Honor.

The defendant, Your Honor, would like to make this a complex matter. There is, however, Your Honor, only one conspiracy consisting of two charges or terms of the con-

spiracy in this case. The first is that the defendant conspired to fix prices, and the second is that the defendant was engaged in a conspiracy to divide territories. Thus, there are two sets of facts, the existence or nonexistence of which are all that need be ascertained.

[fol. 18]

December 19, 1963

The Clerk: Case on trial.

COLLOQUY RE DEFENDANT'S MOTION TO DISMISS ON RULE 41(b)

The Court: Good morning, Mr. McLaren.

Mr. McLaren: Good morning, Your Honor.

May it please the Court, we have filed with the Clerk a motion on behalf of the defendant Sealy, Inc., to—

The Court: I have it before me.

Mr. McLaren: —dismiss on Rule 41(b), and at the outset I would like to comment just a little bit on Rule 41(b), and some other cases in this court which I think have a direct bearing.

Rule 41(b) provides in part, your Honor, that after the plaintiff in an action tried by the Court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event that the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

The Court is trier of the facts, and may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

[fol. 19] If the Court renders judgment on the merits against the plaintiff, the Court shall make findings as provided in Rule 52(a).

The Court. Two and two make four, too.

Mr. McLaren: Yes, sir.

[fol. 20] Mr. Jinkinson: Is that what they are working on?

Your Honor, I don't want to appear to be clairvoyant in this matter, and I am not. I don't propose to be an expert on antitrust.

Your Honor, I think at the pretrial and in my opening statements, I told this Court Mr. McLaren, with a motion to dismiss at the end of Government's evidence, will be arguing that what he done was reasonable, that his use of the trademark is legal, everything else—he has done everything except argue the proposition which I believe is paramount on a motion to dismiss; that is to say, has the Government produced a substantial evidence to show by a preponderance of the evidence that it has sustained the charges alleged in the complaint. I am not interested in whether or not what Mr. McLaren's client had done is reasonable. That is not at issue in this case. There are only two issues in this case; one, have the defendants conspired to fix prices; two, have they conspired to allocate [fol. 21] territory. And if they have, is the allocation of territory illegal per se?

[fol. 22] Mr. Jinkinson: Simmons has got plenty of competition. Englander is there. There are many small local mattress industries competing. As a matter of fact, every one of these licensees makes a private brand mattress which they sell, and they sell outside of this assigned, designated territory, proving that they can compete if they want to.

[fol. 23]

December 30, 1963

RULING ON MOTION

The Clerk: 60 C 844, U.S. v. Sealy, Inc., ruling on defendant's motion for judgment of dismissal made at the close of the plaintiff's case, et cetera.

The Court: That is the only motion pending before me at this time, right?

Mr. McLaren: I believe so, your Honor, yes.

The Court: Well, the motion to dismiss at the end of the Government's case is overruled. However, let me say that should there ever be a decree there will be nothing in it finding that the territorialization, in my opinion, is a violation of the antitrust laws, that phase of the case.

What is the next motion? I am sure he has none. I thought maybe the Government who have been taking about a per se thing for a long time may have a motion.

Mr. Jinkinson: As I understand it, the Court said that there would be nothing in the decree if the Court does hold for the Government eventually, regarding the territorialization.

The Court: That is right.

[fol. 24] Now I am waiting for another motion.

Mr. Jinkinson: Well, I am trying to think whether I am in a position to make that motion.

The Court: All right. There may be something in the decree which says, in my opinion, based on what I heard, that that, the territorialization, is not, based on the evidence, responsible for the ultimate that you complain about.

Mr. Jinkinson: Is that price-fixing?

The Court: That is right.

Mr. Jinkinson: Of course, it is our position that the territorialization itself is illegal per se, your Honor.

The Court: I understand that.

Mr. Jinkinson: And it is a form of elimination of competition just as well as price-fixing is.

The Court: Well, make your motion in regard to that.

Mr. Jinkinson: Could I make a motion tomorrow morning?

The Court: All right.

Will you be here tomorrow morning?

Mr. McLaren: Yes, sir.

[fol. 25] The Court: All right.

Mr. Jinkinson: Ten o'clock?

The Court: Ten o'clock.

(Thereupon an adjournment was taken to 10:00 o'clock, a.m., of the following day, Tuesday, December 31, 1963.)

[fol. 26] IN THE UNITED STATES DISTRICT COURT NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 60 C 844

UNITED STATES OF AMERICA, Plaintiff,

vs.

SEALY, INC., Defendant.

Transcript of Proceedings—December 31, 1963

had in the above-entitled cause taken before the Hon. Richard B. Austin, one of the Judges of said Court, in his Courtroom, in the United States Courthouse at Chicago, Illinois, on Tuesday, December 31, 1963, at 10:00 o'clock a.m.

PRESENT:

Mr. Jinkinson, Mr. Faris, Mr. Fink, Mrs. Greenbaum, Representing the Government;

Mr. McLaren, Mr. Rhodes, Mr. Aufderstrasse Representing the Defendant.

[fol. 27] COLLOQUY BETWEEN COURT AND COUNSEL

The Clerk: 60 C 844, United States versus Sealy.

Mr. Jinkinson: You have no further motions, Mr. McLaren?

The Court: Do you want me to set this down for a defense hearing for the defendant's evidence, or what?

Do you have a motion?

Mr. Jinkinson: Your Honor, I don't think at this time that the Government has any motion or any further motion to make.

I want the Court to know, and I think by way of explanation, this decision was not arrived at lightly. It was after the result of considerable deliberations with my staff and a departure from the usual practice of consulting with Washington during the course of litigation which I am trying.

Your Honor, perhaps thinking out loud, and perhaps not being of an aid to the Court, let me say that as I understand the Court's ruling yesterday at Page 2575, it overruled the motion of the defendant at the close of the Government's case.

The Court then went on to say that "should there ever be a decree that there will be nothing in it finding that [fol. 28] the territorialization, in my opinion, is a violation of the anti-trust law, that phase of the case".

The Court: Well, now, as I understand the posture of this case, no one is—you having rested—is going to put on additional evidence in regard to territorialization, and how further hearing in regard to that is going to be helpful to you in regard to that phase of the case puzzles me.

I, prior to arguments, indicated three questions that I requested help on in regard to that phase of the case and both of you replied to those questions. So let's say that you had some inkling as to how I felt in regard to the evidence on territorialization, on the basis of the questions that I requested each Counsel to answer.

Mr. Jinkinson: True.

The Court: The answers have been supplied to me. I have indicated my reaction to the answers and the evidence in regard to territorialization.

As I understand it, the complaint sets forth two phases that you consider a violation of the anti-trust laws; one, the territorialization, and, second, price fixing.

[fol. 29] Mr. Jinkinson: Right.

The Court: If this were a two-count complaint, which it isn't, as I understand it, and territorialization was in one count and price fixing was in another count, at the end of the plaintiff's case I would have little difficulty in indicating my feelings on the matter by being able, perhaps, to strike one count and let the other count stand. That not being the posture of this case, I don't know what I can do other than what I have done.

Mr. Jinkinson: Your Honor, our position is just a little bit different than the Court's position. I will try to make myself clear.

The Court: I will be happy to have some help, and I would like to have you keep me out here all morning. It is still fifty in my chambers and I don't want to go back.

Mr. Jinkinson: I am not going to keep you all morning, but our position is this: Paragraph 15 of the complaint charges the offense, that is to say, one offense, a violation of Section 1 of the Sherman Act. It was committed, according to Paragraph 16 of the complaint, through two means, one, as price fixing, and the other was territorialization.

[fol. 30] Now, there are two components of the conspiracy charged in Paragraph 15. Now, that is the charge and then we go to the prayer for relief.

Now, in the prayer for relief the Government asks "That the aforesaid combination and conspiracy in restraint of interstate trade and commerce of Sealy products be adjudged and decreed to be unlawful in violation of Section 1 of the Sherman Act."

Now, I assume that the Court can say that you have violated the Sherman Act, defendant Sealy, by price fixing. That is sufficient. Anyone of the two could—

The Court: I assume that, too.

Mr. Jinkinson: That is right.

Now, the Court could make a ruling that, "I do not believe the Government's evidence with regard to territorialization, and I am holding that it does not constitute a violation of Section 1 of the Sherman Act."

Now, I go on and I ask for other relief in the prayer of the complaint, and I consider those matters asked for in the prayer of the complaint to be the issues which this [fol. 31] Court must decide, that is to say, this is the claim for relief that I am making.

I think Rule 56, I believe it is, (b), says that every litigant is entitled to an adjudication of the claims he makes.

Now, I am entitled to an adjudication. If the Court feels that our evidence does not sustain the claim I make for a prohibition against territorialization, the Court may so hold.

For example, in Paragraph 3 I say—

The Court: I think that if the time ever arrives and you ever give me a chance to do it, that is what I am going to do.

Mr. Jinkinson: Well, now, that is what I want to address myself to for just a few minutes.

The Court: All right.

Mr. Jinkinson: Assume I make a motion for a summary judgment in this case as to both phases of the case, that is to say, price fixing and territorialization. Now, if we look at the answer filed by defendants in this case, they have denied both price fixing and territorialization.

The Court: Aren't we beyond the stage of a summary judgment after having gone through a hearing on the merits for ten days, or whatever it was? It seemed like [fol. 32] ten years.

Mr. Jinkinson: I can't perceive any other motion the Government can file other than a motion for summary judgment.

The Court: I understood that you were going to insist at the end of the Government's case that you had made a proof of per se violation and were going to object to the defendant presenting any evidence.

Mr. Jinkinson: I am going to object, that is right. When he offers it, I am going to make my objection to it.

The Court: Maybe that is the stage at which we have arrived at this time.

Mr. Jinkinson: That is right, Your Honor.

I am afraid if I make a motion of any kind—

The Court: You don't have to make a motion.

I will let Mr. McLaren come up here and try and get a date set down to present evidence and maybe that will resolve it all.

Mr. Jinkinson: Very well, Your Honor.

Mr. McLaren: If Your Honor please—

The Court: Is it your position, Mr. Jinkinson, that you have made a per se presentation of price fixing?

[fol. 33] Mr. Jinkinson: It is my position, Your Honor—

The Court: And also territorialization?

Mr. Jinkinson: And also territorialization, that is right, Your Honor.

The Court: I understand that you haven't abandoned it voluntarily.

Mr. Jinkinson: That is right. I should say not.

Now, Your Honor, you see, in the White case, the Government got in this position: It did make a motion for summary judgment and the Court granted it both as to price fixing and territorialization.

Now, the defendants went to the Supreme Court and

said, "Look, I haven't had an opportunity to put on my defense."

Now, the reason they didn't say that with reference to price fixing also, I assume, was because they agreed with the Government that the evidence did show price fixing and they abandoned that on appeal.

But if this Court should rule now—

The Court: Rule now on what? I think I have ruled on everything that is before me.

[fol. 35] Mr. Jinkinson: Well, Your Honor, I say there is no—

The Court: I am waiting for somebody to move that I do something.

Mr. Jinkinson: I say there is no defense to a price fixing case other than that they did not do it.

Now, Mr. McLaren, I assume, has a right to say that.

Mr. McLaren: If Your Honor please, it seems to me, pursuant to our discussions at pre-trial, that Your Honor having ruled on the territorialization question, that this lawsuit ought to be over, and I think that perhaps, if I might—

The Court: I assume that it would be over if you rested.

Mr. McLaren: Subject to a form of order on prices, I assume, Your Honor.

If we simply rested, I judge from what Your Honor said, that you have determined that they have made out no claim for relief on territorialization, and if I might suggest a course of action, perhaps this would avoid further trial time: I think that Your Honor could properly, under Rule [fol. 35] 54(b), if we renewed our motion for dismissal at the close of the Government's case, limited to the issue, to the claim on territorialization, I think Your Honor could properly enter judgment of dismissal of that issue and I would—

The Court: I clearly could if it were set out as a count, Mr. McLaren. I am confused because this is just one complaint. I mean that if somebody had set this up in two counts, price fixing in one and territorialization in another, my problem would be simple. Only half of your motion would have been overruled yesterday.

This is a matter of getting me out of the legal woods.

Certainly there can be no question as to what is in my mind as to what I think the proof shows in this case in regard to each aspect of the case.

Now, if somebody can suggest how, properly, I can proceed from this point on, I will be very happy to receive that suggestion.

I suppose a proposed consent decree covering price fixing or a proposed contested decree covering price fixing might bring it to a head.

[fol. 36] Mr. McLaren: Well, I think it could, Your Honor, if we had disposed of the territorialization issue, so that if the Government wants to, as I gather what they are thinking about, they could then appeal from it.

The Court: I would be very happy to have you bring me some proposed findings of facts in regard to the territorialization.

Mr. McLaren: Well, this is what I wanted to suggest, Your Honor, that you grant us leave to refile our motion under Rule 41(b) directed to the claim, and I think that this is supported by Rule 54(b) just as much as if it were in separate counts. It is not as clear a case, but I think that Mr. Jinkinson agrees, that it is a separate issue and a separate claim.

The Court: I want to clearly have before the Court of Appeals my thinking on this matter.

I want you, if you desire, to go up and appeal the price fixing aspect. I want Mr. Jinkinson to have an opportunity and a good record for him to go up and present his theory in regard to territorialization. I wish each of you to have that right, and what I am seeking is to have each of you suggest to me the manner in which you think those aspects [fol. 37] which tend to favor and those aspects which tend to disfavor you can be most clearly presented to the Court of Appeals. That is what I want to do.

Mr. McLaren: Well, my suggestion would be, Your Honor, that we do submit proposed findings and conclusions on the territorialization claim, that judgment be entered dismissing that, that as to the pricing claim which is separate and distinct, that we each submit a proposed form of order to Your Honor, supported with such—

The Court: I assume that Mr. Jinkinson would permit

you, as he did in the Spring Air case, would permit you to continue to advertise in national magazines.

Mr. McLaren: Well, I would want to show, so that our record would be complete on that aspect, that it is customary in the industry, Your Honor, to have suggested retail prices in the national advertising. It is an industry practice. It is something that we do badly need. What we don't need—I told Your Honor at pre-trial that we would never have litigated this case if it is a question of policing resale prices. We say that we don't do it. We don't claim a right to do it. We wouldn't litigate this case. We would [fol. 38] take an order that says that we can't police resale prices.

We do have to have the right to have suggested resale prices for advertising. And in the Spring Air decree, I felt, Your Honor, that they bought their peace rather dearly there in that as Your Honor held here wholesale prices are not within the scope of the complaint, and yet the consent order there, as I read it, does prohibit them—

The Court: The only aspect of the Spring Air decree that I am aware of is this permission to continue national advertising of suggested retail prices. I am not aware of the other aspects of that decree, and I think that they are not relevant to this case. I don't want to know about them.

I think that everyone now knows my attitude in regard to the two aspects of the case.

As I say, if it were set up in counts, why, this would be just a clean-cut decision one way or the other in regard to that; because they are interwoven in a one-count complaint, why, if you will break it down in some fashion so that each of you feel satisfied that if you desire to appeal, that your record is good, and for that purpose I will continue this for whatever time you suggest that this can be [fol. 40] worked out in that fashion.

Let me say that I feel in regard to price fixing that there was a conspiracy, based on the evidence up to this point, a conspiracy between the stockholder corporations of Sealy and Sealy, Inc., in regard to local price fixing attempts, and I have indicated that, in my opinion, sales and local advertising are so closely related that they have a direct bearing on each other and nobody is going to go in on an

ad of Goldblatt's that they are selling posturepedies at seventy-nine fifty and say, "I saw your ad for seventy-nine fifty and I would like to buy one for fifty-nine fifty"; so that what I am concerned with is the policing of the local advertising as well as local resale prices. I used to call those prices retail, but you fellows, after ten days, have gotten me using the phrase of the industry, resale.

Mr. McLaren: Well, I think—I can't speak for Mr. Jinkinson—but I believe that his thinking and mine are alike, that we in effect have two separate claims, and it is in the same legal posture as if they were two separate counts, that we could have a judgment on the—

The Court: If you fellows can convince each other that [fol. 40] what you are going to do puts each of you in a proper position to appeal my order, I will be very happy to ride with you.

Mr. Jinkinson: I think the first thing the defendant would have to do would be to rest his case.

There couldn't be any findings of facts or conclusions of law or adjudication by the Court unless the defendant has rested and—

Mr. McLaren: Well, I don't think we are in a position to do that as far as the price allegations are concerned, because there is still the question of the form of the order and so on, and we think that there are certain things that we should present on that score.

Now, perhaps any further evidence on that score could be provided by order of the Court, and we have made the representation at pre-trial that we would not fight a lawsuit strictly on that ground.

I believe in one or two other cases the Court has limited further proceedings to the question of a scope of relief.

The Court: Well, I suppose one way to bring this thing [fol. 41] to a head would be for you to make an offer of proof in regard to price fixing, and I would rule on your offer of proof.

Mr. McLaren: I think that if the Court would receive from each side the proposed form of order, and whatever offer of proof there is and so on regarding the scope of relief on the price situation, that that ought to dispose of the case, along with a judgment of dismissal on the territorialization question.

The Court: Well, I don't know how I can make my position any clearer than I have endeavored to.

Mr. McLaren: I certainly think that you have, Your Honor.

The Court: You fellows have been in this business a lot longer than I have and I am suggesting to you that you prepare the disposition of this case in such a fashion that each of you can get the most comfort possible. I want each of you to feel that you haven't been foreclosed in making your record so that you may do, after the matter is disposed of, and I hope some day that it will be, whatever future steps that you care to take.

Now, I suppose both of you are tied up in cases around [fol. 42] the country and all that sort of thing, but I would like to have you get to work on this and delight me some day by coming in and saying, "Well, we have arrived at this suggested, agreed disposition of the case". Whether that time will ever come or not, I don't know.

I am suggesting that you put this record in the shape that each of you feel you want it to be in so that you may benefit from it to the extent that you hope to.

Now, does anybody care to suggest when that time might be, knowing whatever date that you suggest you probably won't be ready at that time.

Mr. McLaren: Well, we would like, Your Honor, very much, to present the findings of facts and conclusions of law, and I think that maybe thirty days would be adequate for that.

The Court: Meanwhile, are you going to talk to your alter ego about the provisions of a suggested decree in regard to the price fixing aspect.

Mr. McLaren: I will be glad to do that, Your Honor, but I realize the difficulties that they are laboring under, [fol. 43] having obtained an order in Spring Air and the Restonic cases of a certain variety where they didn't go to trial at all, and we don't feel that we can accept or agree on that order, and I don't suppose that he wants to depart—

The Court: Well, I assume that if the prayer for relief in this case didn't involve wholesale prices, I don't know how that could become relevant in an order in this case.

Mr. McLaren: I think that is absolutely right.

The Court: I tried to ascertain at the outset whether that was in any way involved and was assured by both sides that it was not.

Mr. McLaren: Well, we will certainly get together with the Government and try and work it out, and if we can't, Your Honor, why, I would suggest that we make our offer of proof.

The Court: I will put this on my February past case calendar for a report. At least I know that I haven't lost track of it, and I urge each of you to try and come in here long prior to that with some suggested disposition of the matter.

Mr. McLaren: All right, Your Honor.

[fol. 44] Mr. Jinkinson: Thank you, Your Honor.

The Court: All right.

(Which were all of the proceedings had in the above-entitled cause on the day and date as aforesaid.)

(Case adjourned to the February Past Case Calendar.)

[fol. 45]

February 14, 1964

EARL H. BERGMANN, a witness called on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McLaren:

[fol. 46] Q. In the course of your employment in the bedding business, Mr. Bergmann, would you say you have become familiar with the industry and its problems?

[fol. 47] A. Well, I have been in the business for forty years, and I think I have a good general knowledge of it.

Q. Are you familiar with the National Association of Bedding Manufacturers?

A. Yes. I was not permitted to be an officer there, because the Bedding Association does not permit anyone except the manufacturers to be officers or directors, but I was active in attending committees and worked on some committees, and I knew the officers of the Association very well and even recommended to them certain people who I thought would be capable of being directors.

Q. Do you happen to know how many manufacturer members there are in the NABM?

Mr. Jinkinson: Your Honor, I object to this line of interrogation for the reason that it is irrelevant and immaterial to any issues involved in this lawsuit. The National Association of Bedding Manufacturers is not a defendant in this case. We haven't made any charges against them. This is totally irrelevant to the issues involved in this case.

[fol. 48] I would like to have a standing objection to all interrogation along this line so it is not necessary to repeat it.

The Court: The purpose of this is what, Mr. McLaren? To show the Court the background?

Mr. McLaren: The nature of the industry and the population.

The Court: The objection is overruled. There is a standing objection to all of this. I will stop it myself if it becomes any more irrelevant.

Go ahead.

By the Witness:

A. Their enrollment was between four and five hundred members.

By Mr. McLaren:

Q. Manufacturers? And they were manufacturers?

A. All manufacturers.

Q. Yes. Now, did there come a time, Mr. Bergmann, after you started in the bedding business, when a substantial change took place in the manufacturing market of mattresses?

[fol. 49] A. Yes. That occurred in 1926. Prior to that occurrence, the mattress business was not a very substantial business, consisting of substantial manufacturers. There were rather small manufacturers.

In 1926, Simmons came out with the Beautyrest mattress, which was nothing more or less than the picking up of a unit that had expired, from the patent point of view, developing it into a new mattress which they announced for the first time and revolutionized the industry, because they not only started to advertise it nationally, but they also pre-ticketed it at \$39.50 and established, for the first time in the industry, an indication of quality at a given price.

[fol. 50] By Mr. McLaren:

Q. Mr. Bergmann, is this the type of material which you referred to during your testimony that was developed by the Sealy staff?

A. Yes, sir.

Q. In support of these various promotions, is that correct?

A. Yes, sir.

Mr. McLaren: I am sorry, your Honor, I should correct the record here; apparently 21-B is a 1960 set of promotional material. It refers to "On sale now at a 1956 price."

The Court: All right. That sort of indicates itself, too. You are just correcting the record, though?

Mr. McLaren: Yes, Your Honor.

By Mr. McLaren:

Q. Mr. Bergmann, to what extent is the national and local advertising important in promotions such as you describe?

A. It is very important and probably constitutes better than 50 per cent of the volume of the company.

[fol. 51] Q. Now, just going back to the subject of promotions for a moment, I believe you testified that competitors had such promotions.

I wanted to ask you the question, What about mail order firms, large retailers, and so on, who have their own private brands? Do they have promotions?

Mr. Jinkinson: I object to the form of the question, being leading and suggestive. I suggest it is irrelevant, immaterial, and not probative of any of the issues involved in this case. And may my objection stand.

The Court: The objection is overruled, and it may stand.

By the Witness:

A. Yes, they did have.

By Mr. McLaren:

Q. Can you give us some examples?

A. Well, Sears Roebuck and Montgomery Ward follow very closely along the national pattern. Then you had mail order houses, like Spiegel, and other people who likewise did the same thing. It was an industry practice.

Q. To what extent would you say it is competitively important for Sealy and its licensees to be able to engage in national advertising and run such promotions?

Mr. Jinkinson: Objected to as calling for an opinion and conclusion of the witness.

The Court: Overruled.

By the Witness:

A. I would say it was vitally important.

By Mr. McLaren:

Q. Why do you say that? You say vitally important?

A. I say that for the simple reason that, without it, you would not be able to hold your place in the market with competitors who are in a position to do that against you. You have no choice.

Q. Do you have any basis for a comparison of the experience of the mattress manufacturer who does and who does not have the advantages of national advertising promotions?

A. Well, there are many mattress plants who would fall in the category of not having advantages and, therefore, [fol. 53] they have made no progress in our own particular group.

I can point out cases of where we have brought in a licensee for a certain section of the country who probably was doing, maybe, \$200 or \$300 thousand volume, and after a matter of five years or ten years, he was up to a million or more.

We have a situation right here in the City of Chicago where I believe the plant, when it came in in 1937 or 1938, was doing around \$200,000. Today it is doing \$6 million.

Q. Is there any other example, in New York, New York State?

A. Well, an outstanding example would be Schenectady, which was a small plant when we came in, and this man was having such a hard time trying to make a living that he was selling maple bedroom furniture on the side. And today he is doing over two and a half million in bedding only.

Q. What about the Chester, Pennsylvania, licensee? Didn't you bring him in?

A. Yes. When I brought him in, he was not doing any [fol. 54] mattress business at all. He was primarily in the upholstery field, and the mattress business, under the brand of Sealy, became so important and large to him that he gave up the furniture end. And today he is doing about three times in bedding what he used to do in furniture.

Q. And do you attribute this success of these people to the advertising and the services that they are getting from Sealy.

Mr. Jinkinson: I object to the form of that question, leading and suggesting an answer.

The Court: The objection is sustained.

By Mr. McLaren:

Q. At the time you resigned as president of Sealy, do you recall approximately how much Sealy was spending a year on advertising?

A. Approximately \$1 million.

[fol. 55] Q. Thank you.

And I believe that I indicated in reading from this exhibit that certain matters were referred to the agency. Would that be the advertising agency?

A. The advertising agency.

Q. Hired by whom?

A. By Sealy, Inc.

Q. And to what extent was there a working relationship between the staff and the advertising agency?

A. Well, the advertising agency served almost as a member of the staff. There was a close coordination and liaison between them.

Q. Based upon your experience as president during this period of 1950 to 1960, Mr. Bergmann, for how many Sealy licensees was it feasible to spend \$30,000, say, for a Life magazine ad?

A. Financially—

Mr. Jinkinson: Your Honor, I object to that as being irrelevant and immaterial. I don't see any relevancy to this at all.

The Court: Maybe he is endeavoring to show the necessity [fol. 56] for national advertising by Sealy, Inc., I think, and for that purpose it may go in.

By the Witness:

A. Financially, possibly two or three might have had the money to do it, but from a practical point of business it wouldn't be feasible to do it.

Q. Why not?

A. Because to spend nearly \$30,000 in an isolated magazine, a national magazine, and not have the benefit of a complete advertising, merchandising program backed up by all of the paraphernalia of window displays and stuffers and the many things that you must have, you cannot possibly make it financially successful and, therefore, I would say none would do it and they couldn't do it without Sealy, Inc.'s help.

The Court: I assume a manufacturer in Connecticut didn't have any of his mattresses to sell in California, is that right?

The Witness: No, he wouldn't be shipping to California.
The Court: That is what I mean.

[fol. 57]

March 13, 1964

Mr. McLaren: Your Honor, I am reading from the deposition of DuVerne G. Hutchinson, called by the defendant for examination under the civil rules, in a deposition on February 1, 1962.

[fol. 58] I'm turning now to the bottom of page 15, your Honor:

"Q. Simmons places advertisements, for example, in magazines?

"A. That is correct.

"Q. And I believe I have seen ads by Simmons in magazines such as Life, Saturday Evening Post?

"A. Yes. Better Homes and Gardens, House and Gardens, New Yorker.

"Q. Holiday?

"A. I do not recall any advertising in Holiday. Ladies Home Journal, American Medical Association.

"Q. Modern Brides?

"A. Yes, yes. I did not get the Brides yet.

"Q. Are there other bride books, too?

"A. Yes."

Skipping the next two lines.

"Q. Well, other trade books besides the AMA Journal [fol. 59] —motel type things, maybe hotel books?

"A. Yes. I am not familiar with them, because I am not in the contract end of the business. But I am sure they are in some of those.

"Q. What about radio? Does Simmons use radio?

"A. We have used radio.

"Q. TV?

"A. We have used TV.

"Q. Newspapers?

"A. Yes, we have.

[fol. 60] "Q. Do you as a salesman regard these national promotions as helpful in generating volume and so on?

"A. Yes.

"Q. Mr. Hutchinson, do you also furnish mats for advertising by the stores other than in connection with these national promotions?

"Mr. Long: We make that same objection which we did before."

Mr. Fink: And we make the same objection.

The Court: Same ruling.

Mr. McLaren: (Reading)

"A. We generally provide some type of mat on every thing we make to assist dealers in preparing newspaper advertising."

[fol. 61] "Q. And what you are doing is representing the value of the product to the consumer, and hoping that the retailer follows the suggested retail price; isn't that right?

"A. No, we do a little more than hope in fair trade states.

[fol. 62] "Q. Yes, I understand that.

"Let me ask you a few questions about competition, taking the midwest—the Chicago area as an example."

I neglected to mention, I believe, your Honor, that we had gone into this question of competition in the Chicago area, and the point here is that we are showing, to the extent that Sealy mattresses may be fair traded wherever they may be fair traded, or the extent that they have suggested retail prices. The standard, I believe, is whether or not there is free and open competition. In fair trade states, you are permitted to fair trade a product if it is in free and open competition with other items.

"Would you have in mind at all how many competing mattress manufacturers are out selling in the Chicago area?

"A. Well, there is quite a few. There are, of course, more manufacturers in Chicago—selling in the Chicago area than there are located in the Chicago area.
[fol. 63] "Q. Yes.

"A. I imagine there is 15 or 20.

"Q. Fifteen or twenty that are—well, let me hand you the Chicago classified directory. Will you look through there and mark any competing mattress manufacturers in this area and then give me another figure.

"A. Appreciate this, I do not accept nor do I define a mattress manufacturer as a mattress manufacture merely because he calls himself that in the Red Book.

"Q. Yes, but you would know—

"A. And in answering your question, I was not using that interpretation. The fact that he is listed in the Red Book does not make him a mattress manufacturer, in my opinion, as such.

[fol. 64] The Court: All I am interested in is whether we can't save some time by the government indicating that they don't contend that Sealy has the mattress market in America by the throat and that they have no competition among other manufacturers because Simmons does make mattresses and Englander does make mattresses and Bur-ton-Dixon does make mattresses.

Mr. Fink: Whether they do or not, we are not saying, but we will say this, it is not an issue. We have not put that in issue in this case and we don't feel that it has any relevancy at all. We haven't contended it and—

[fol. 65] The Court: I don't know why that statement wouldn't stop them from urging that in the Supreme Court, Mr. McLaren.

Mr. McLaren: Well, I didn't get to mention, your Honor, the other leg of their contention and theory as I understand it; that is that—and it is alleged in the complaint—that Sealy goes on and polices retail prices and requires their being maintained and that they are maintained and—

The Court: Yes, but I don't know—I mean, they do contend that and there has been some evidence that indicates that they weren't whistling in the dark when they made that contention, but that still has nothing to do with your endeavor to prove that other people make mattresses in America besides Sealy.

Mr. McLaren: If the government would concede that Sealy products are in free and open competition with other products of other manufacturers, then this line of evidence is unnecessary, but we cannot take the chance, I am afraid. [fol. 66] The Court: Now, we are getting down to sort of semantics which can hide feelings. Maybe if you could better define what you mean by "free and open competition" we could agree on some words or some meaning as to what those words mean, as far as you are concerned. Maybe we could get some place. What do you consider?

Mr. McLaren: I am using it in the same sense that it is used in the fair trade statute, your Honor, that a brand manufacturer or distributor, under the different state laws, is entitled to fair trade wherever his products are in free and open competition with other products. In other words, that there is substantial competition among different brands; retailers and buying brands and consumers and buying brands have an adequate number of choices. And what I am concerned about, your Honor, is that they will argue the inferences of the facts shown in the record, that there is agreement at the Sealy level and there is dis- [fol. 67] crimination of suggested retail prices and that Sealy in its advertising regulations has, so to speak, policed the advertising.

We concede there is a difference between policing advertising and actual selling prices.

The Court: I understand that that is your position.

Mr. McLaren: Yes.

The Court: I understand that, but I still don't see quite the materiality and relevancy of evidence in this lawsuit that Sealy has competitors in the mattress business. I think there has been no contention, and I don't think anybody could successfully prove that Sealy isn't in competition with Simmons and Englander and Serta and Spring Air, and I don't know how many you have to be in competition with to make it free and open, but I would think

that the number that I have named makes it free and open.

Mr. McLaren: Well, I think that is true, your Honor, and the thrust of the proof is that with all of these substantial competitors in the business it is impossible that we do actually maintain or police the real resale prices.

[fol. 68] The Court: That is going to be your argument.

Mr. McLaren: Yes, sir. And that is what I am going to base it on—the evidence.

The Court: I know. I hope—well, I assume that you are going to try to introduce some evidence in support of your position. But I don't think that evidence that other people, many other people, manufacture mattresses with which Sealy competes is something that is necessary proof in this lawsuit. It is conceded that other people make mattresses, that you do compete with Simmons, you do compete with Englander, you do compete with Spring-Air, you do compete with Burton-Dixie.

I doubt if the Government, at this time or at any time, by inference or through the back door, or any other way, can contend that you don't have many business competitors in the mattress industry.

Mr. McLaren: I think that is exactly right. Well, your Honor, suppose—

The Court: You concede that they have competitors in [fol. 69] the mattress business?

Mr. Fink: Yes, we concede that, your Honor.

The Court: Many competitors?

Mr. Fink: Yes, many competitors. But we do not concede anything in this language of free and open competition.

The Court: I haven't asked you to concede that. I just asked if you concede that they have many competitors in the mattress business.

Mr. Fink: That's correct.

• • • • •

[fol. 70] Mr. McLaren: Well, the witness in answer to the question about Cleveland, whether there is a large number of manufacturers in strong competition, said:

"A. Yes, there is probably not as many as Chicago.

"Q. Now, some of these various companies that you

[fol. 71] have listed in going over the Red Book there, there are a number of them that advertise their mattresses, are there?

"A. Quite a few of them. I hesitate to say all of them. Quite a few of them.

"That do their own advertising rather than through a dealer?

"Q. Yes.

"A. Yes. There is several of them.

"Q. Now, do you recall, Mr. Hutchinson, at what date the company commenced advertising trademark mattresses in media that were circulated nationally?

"Mr. Faris: Same objection."

The Court: Overruled.

Mr. McLaren: (Reading)

"A. I think that goes back as far as I do.

"Q. Well, let me ask it another way: When you first came to the company, you have some recollection of the company advertising in nationally-circulated media of trademark items?

"A. I believe they were advertising at that time.

"Q. Do you have any recollection of which of the particular trademark mattresses were most heavily advertised at that time?

"A. Yes. The Beauty Rest.

"Q. And throughout the years, can you state whether or not the Beauty Rest has been the most heavily ad-[fol. 73] vertised of the Simmons mattresses?

"A. Yes. It has been."

Skipping over to the bottom of Page 57:

"Q. What trademarks in the Simmons line are rather regularly advertised currently, day in and day out, aside from national promotions and sales of another sort?

"Mr. Faris: Same objection."

The Court: Overruled.

Mr. McLaren: (Reading)

"A. You mean regularly advertised by dealers?

"Q. By the Simmons Company, either alone or in co-operative advertising schemes with dealers.

"A. Aside from national promotions?

"Q. Yes.

"A. Well, they would be Beauty Rest and Deep Sleep and Slumber King and Back Care, and the Beauty Rest Luxury—Beauty Rest Elegance, rather.

"Q. Well, all right. Let us take them one at a time.
[fol. 74] "Would you have any idea say for the current year how many times an advertisement for Beauty Rest might have appeared in Life Magazine?

"Mr. Faris: Same objection."

The Court: Overruled.

Mr. McLaren: (Reading)

"By the witness:

"A. I would say four or five times.

"Q. How about the Ladies Home Journal?

"A. Maybe three or four times.

"Q. Saturday Evening Post?

"A. Four or five times.

"Q. McCall's?

"A. Once or twice.

"Q. All right.

"Would you have any idea during the current year how many times an advertisement for, say, Deep Sleep has appeared in Life?

"Mr. Faris: Same objection."

The Court: What is the purpose, by the way, of this at this time?

[fol. 75] Mr. McLaren: I believe, your Honor, that we wind up here on the proposition that these are the ads that they were using, and that they contained the suggested retail prices, and the promotions—

The Court: Is there any contention that they didn't?

Mr. McLaren: No. But this was giving the order of magnitude of the advertising.

The Court: What value or what comfort do you expect to get out of that?

Mr. McLaren: Not a great deal, your Honor. It just completes the picture of this thing, and there is only about another half a page of it.

The Court: All right. Go ahead. Get whatever pleasure you can out of that.

Mr. McLaren: The question was how many times advertisements for the Deep Sleep had appeared in Life.

"A. I don't know whether there was an advertisement in Life, or not.

"Q. Do you know whether it was advertised in the Saturday Evening Post?

[fol. 76] "A. No. I think the ads we had were in Look last year."

Then Page 60 at the bottom:

"Q. And would it be fair to say that the pattern of magazine advertising established last year as to the brands advertised—strike 'brands' and substitute 'trademarks'—and the approximate number of times they appeared in a given magazine would have been fairly representative of the Simmons advertising over the past few years?

"A. I would think so."

[fol. 77] Mr. McLaren:

I would like, now, to go to the deposition of Mr. Raphael J. Musicus, an executive of the Englander Company.

[fol. 78] Mr. McLaren: Skipping over to Page 12, toward the lower half of the page:

"Can you tell us, Mr. Musicus, the media in which Englander's bedding is advertised?

"Mr. Long: Same objection."

The Court: Overruled.

Mr. McLaren: (Reading)

"By the Witness:

"A. Television, magazines, newspapers.

"Q. Radio?

"A. Is this—the tense of that question, is that present tense or past tense?

"Q. Let us take the present tense.

"A. That is it.

"Q. Has Englander in the past advertised over the radio?

"Mr. Long: Same objection."

The Court: Overruled.

Mr. McLaren: (Reading)

"Q. Within your experience, of course.

"A. Yes.

[fol. 79] "Q. Does Englander advertise in magazines with national circulation?

"Mr. Long: Same objection."

The Court: Overruled.

Mr. McLaren: (Reading)

"Yes.

"Q. Could you name some of those magazines?

"Mr. Long: Same objection."

The Court: Overruled.

Mr. McLaren: (Reading)

"A. It is advertised in Life Magazine, Saturday Evening Post, Good Housekeeping, and numerous others.

"Q. Brides, Magazines, for example, Homemakers' magazines?

"Mr. Long: Same objection."

The Court: Overruled.

Mr. McLaren: (Reading)

"A. Of that category, yes.

"Q. Does Englander also engage in cooperative advertising with retailers for local newspaper advertising?

"Mr. Long: Same objection."

[fol. 80] The Court: Overruled.

Mr. McLaren: (Reading)

"A. Yes."

And then Mr. Rhodes had marked Musicus Exhibit No. 2, and that is Defendant's Exhibit 46, and it was identified — Mr. Musicus indicated that he was familiar with it as an advertisement of Englander appearing in Better Homes and Gardens, September 1961 issue.

I will offer DX-46, your Honor.

The Court: The objection is overruled, and it may be received subject to motion to strike.

(The said document so offered and received in evidence, was marked Defendant's Exhibit 46.)

Mr. McLaren: Then going over to the bottom of Page 15, your Honor:

"Q. Would there generally be a price included in the Englander advertisement?

"A. Well, we will generally point up a mattress for purposes of illustration with a price. But that generally [fol. 81] is not of any consequence in our type of advertising.

"Q. But it generally will be included?

"A. There will be some reference to some item in the line."

Mr. Long entered his objection there. I guess he got it in after the answer.

[fol. 82] Mr. Rhodes: The next deposition, your Honor, is of Marvin Graff, which was taken in Indianapolis, Indiana, by the Defendant on October 29, 1962.

[fol. 83] "Q. Let me ask you about the bedding industry and first directing your attention to the bedding manufacturers, are there a number of bedding manufacturers offering their lines in the trade area?

"A. Oh yes, I would say every major line in the Midwest have offered their products to us at one time or another.

"Q. Can you name the principal manufacturers that are acting in this area?"

Mr. Fink: Objection, your Honor.

[fol. 84] The Court: The reason for the objection?

Mr. Fink: The reason for the objection is the same as we offered before on the bedding manufacturers; that it is immaterial that there are a large number of bedding manufacturers that were—in this case, a number of bedding manufacturers offering their bedding in the trade area. It is immaterial to the issues of this case.

The Court: Well, on the question of price, I agree with you. There seems to be some concern that you will raise a point at some time that if they don't prove it now, you will indicate that there is a monopoly as far as Sealy is concerned; because there aren't any other bedding manufacturers.

Proceed, Counsel.

Mr. Rhodes: Thank you, sir.

The witness proceeded, your Honor, to name a number of bedding manufacturers. I think we can skip over the naming of them.

The Court: All right. I think we heard the names enough.

[fol. 85] Mr. Rhodes: Question, at the top of page 7:

"Now, what about the retailing end of it. What types of stores in your trade area handle bedding?

"A. What types of stores?

"Q. Yes.

"A. I would say almost all types of furniture stores, new and used offer bedding for sale, besides some individual sleep shops that have recently opened up.

"Q. And also department stores?

"A. Oh, yes, department stores are a major factor in bedding.

"Q. Do you have an idea of the number of retail stores in your trade area that handle bedding?

"A. I would say two hundred fifty or more.

"Q. And that would be in this whole area of fifty to one hundred mile radius around Indianapolis?

[fol. 86] "A. Probably more than that but I am bringing it down to a minimum."

[fol. 87] Mr. Rhodes: The next deposition, your Honor, is that of Irvin Pelts, taken by the defendants in Memphis, Tennessee, on October 30, 1962.

• • • • •
[fol. 88] Mr. Rhodes: (Reading)

"Q. The question is, what types of stores handle bedding?

"A. Well, the furniture stores and department stores.

"A. In your particular area here in Memphis around your ~~store~~ for a mile or so, which are the principal ones? Just give us an idea."

Then, your Honor, the witness named stores, and then:

"Q. Could you estimate how many stores there are [fol. 89] in your trade area that are handling bedding?

"A. You mean in the Memphis area?

"Q. In your trade area.

"A. It would run into several hundred stores."

Skipping over to Page 6:

"Q. What would you say with respect to the degree of competition which exists among retailers in the selling of bedding.

"Mr. Jinkinson: That is objected to for all the reasons heretofore urged. Further, it calls for an opinion and conclusion of the witness, no proper foundation having been laid."

The Court: Overruled.

Mr. Rhodes: (Reading)

"By Mr. McLaren:

"Q. Based on your experience, Mr. Pelts, would you state what degree of competition exists at the retail level of mattresses?

"A. I think it is very highly competitive. There is no [fol. 90] question about it. In mattresses, business is more competitive at the retail level than I think most anything in our operation.

"Q. Compare mattresses with some other types of item, say lamps or couch goods, something like that. You say they are more competitive?

"A. Yes. The main reason I would think that, there are certain price categories that people are looking for in the bedding field. When they come out to buy a mattress, they have a certain amount they want to spend, and they know that the categories get into the \$39, \$49, \$59, \$69, and on up. But a person comes in to look for a lamp, it is a blind item, more or less. I am a buyer and I couldn't tell you the price of that lamp right there. I couldn't come within five dollars of it."

[fol. 91]

March 16, 1964

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. McLaren:

DX 35 refers further to the use of the telegram in connection with the Golden Sleep newspaper ad, paragraph 2:

"We will eliminate the phrase 'here is why' and change the panel at the top of the ad to end up in an arrow pointing to the telegram."

And then DX 36 is the dealer promotion guide in which the third page of the Exhibit, the fourth page of the Exhibit, fifth page of the Exhibit, the sixth page of the Exhibit and the seventh page of the Exhibit, all of these pages being pictures of the Sealy ads that went with this sale—do we produce either this telegram, 930L or else one of the same wording with different names on it. It is our contention that that telegram, 930L, is not what it seems on its face.

Mr. Jinkinson: Your Honor, as I understand it, Mr. Fink just told me that he took the position Friday that licensees can't get together and set prices on these mattresses, and the mere fact that they later fair trade doesn't

immunize the proposition that they had no right to get [fol. 92] together and set prices, licensees. Now, that was his—

Mr. Fink, am I stating your position correctly?

Mr. Fink: Yes.

I can't understand what he is talking about and therefore I can't answer him.

Mr. Jinkinson: Me either.

Mr. Fink: But I am sure that my position has been the same as we have always held, that fair—

The Court: I mean a dealer in a fair trade state can fair trade.

Mr. Fink: An individual dealer may fair trade if he sets his own price, but he can't take a price that has been set by other dealers, other people on the same level, and use his fair trade to immunize that act. When they go together—and that is what I said Friday—when those people got together, if we prove that, and they agreed upon a price, that was illegal, and the fact that somebody may have gone out and fair traded after that using that price will not immunize that agreement:

[fol. 93] The Court: Well, none of these dealers are charged with being in this conspiracy, Mr. Fink.

Mr. Fink: Pardon me?

The Court: None of these dealers are charged with—

Mr. Fink: The licensees are, that is what I mean.

The Court: I know the licensees are.

Mr. Fink: That is what I meant.

Normally a dealer doesn't go out and fair trade, it is the manufacturer that—and maybe I misspoke myself, but what I am getting at is that if the licensees got together at a meeting and set the price, the fact that one of them went out and fair traded it, the product, at that price, will not immunize them from the charge under the Sherman Act.

Now, I think that is pretty clear, Mr. McLaren, and I don't think I have said anything else.

Mr. McLaren: That is only part of the statement Mr. Fink made.

[fol. 94] The Court: Up to that point, do you go along with what he said right now?

Mr. McLaren: I understand that that is their contention, and I contend that that is about as doctrinaire an approach as you can take to the antitrust laws.

There is no case that they can point to that says that is the law, but they are trying this new theory out in this case. That is what it amounts to, your Honor, in my view.

Now, the second theory that Mr. Fink talked about, which is the theory of evidence, is that Sealy supervised a conspiracy under which fair trading was part of the conspiracy that he was talking about, and we can find that in Friday's record if we need to. I was surprised to hear him say it.

[fol. 95] The Court: Mr. Fink apparently disavows that now.

Mr. Fink: I don't think I have ever said anything other than what I have just said now, and the fact that the statute upon its face, fair trade statute upon its face, says that no one on a horizontal level can get together and fix a price and come within its exceptions, and that is just what we contend has happened here.

Mr. Jinkinson: I don't see why Mr. McLaren says this is some kind of a new legal proposition. The Miller-Tydings Act and McGuire Act on its face says that.

The Court: Now he has found something in the record.

Mr. McLaren: Transcript Page 3069 Mr. Fink stated—there had been some colloquy beforehand—

Mr. Fink: Let's read all of it, Mr. McLaren.

Mr. McLaren: Mr. Fink said:

"One of the things that we contend is that Sealy, Inc., itself aided in the setting up of this fair trade program and was an impetus to the thing."

[fol. 96] Then the Court asked:

"You mean Sealy, Inc., got Ohio to pass a fair trade statute?"

"Mr. Fink: No, but our documents have shown that they brought these people together and said, 'Let's fair-trade.' "

Well, we think the documents don't show any such thing, and I would like to know the purpose for which they put in this telegram when it was part of an advertising

promotion, and the Grand Jury members and the defendant's numbers on the document show that it was part of an advertising promotion, yet they put that telegram in as part of their price case.

Now, it seems to me that we certainly have a right to put in the remainder of those particular documents, your Honor.

The Court: Well, for the purpose of explaining that, I think perhaps you are right, but not for the purpose that you otherwise stated.

I think perhaps if this is the basis of a campaign and the center approach of an advertising scheme, you are right.

[fol. 97] Mr. McLaren: That is right. That was the purpose.

The Court: This is your attempt to explain that telegram?

Mr. McLaren: Yes, that is right, your Honor.

The Court: Without going into the question of whether it is a violation of the antitrust law or the fair trade law or any other law. You say this telegram was sent so that it subsequently could be used in advertisements.

Mr. McLaren: The theme of the promotion, yes, your Honor. That is the purpose of the offer, to explain the telegram.

The Court: For that purpose and for that purpose alone, it may be received.

Mr. McLaren: Thank you, your Honor.

At this time, your Honor, the defense rests on the pricing issue on which we have been introducing evidence and, of course, as far as the territory issue is concerned, we will renew our motion to dismiss on the 41(b) at the end of all the evidence, or now, if the Government doesn't have any rebuttal.

[fol. 98] Mr. Jinkinson: Well, did I understand, Mr. McLaren, you have no further evidence to offer in this case either as to territorialization or price-fixing? Is that right?

Mr. McLaren: I have made my statement for the record clearly and succinctly.

Mr. Jinkinson: Counsel has got to make up his mind one way or the other. I think he has to rest his entire defense.

The Court: As I understand it, the defendant has rested.

Mr. Jinkinson: That is what I understand, too, your Honor.

Mr. McLaren: Of course, your Honor, we have taken the position that under Rule 41(b) and the separate territorial claim that we have not put in evidence and we will renew the

The Court: I understand why, based upon what I said.

Mr. McLaren: Yes, your Honor.

Mr. Jinkinson: Do I understand that he has made an election not to offer any?

The Court: As I understand it, you have rested your case.

[fol. 99] Mr. McLaren: That is right, your Honor.

I assume that under the law, should the Government take an appeal in this case, and should the Court, the Supreme Court, for example, hold that a prima facie case was made out in regard to territory, then we would have a right to put in a defense on territory.

Mr. Jinkinson: That is just exactly, your Honor, what I am trying to escape here.

The Court: You are talking about something two or three years from now.

Mr. McLaren: Very possibly so.

Mr. Jinkinson: I am talking about now, today, I want him to put his defense in.

The Court: As I understand it, he has rested his case, his defense on the case now on trial before me as of the 16th of March, 1964.

Mr. Jinkinson: And I understand that no one has said that he couldn't put in any defense on territorialization.

The Court: I understand that this is an election based on maybe his being misled by the Court as to what the Court said at the end of the Government's case.

[fol. 100] Mr. McLaren: I am sure that the Court is correct and that we have not been misled, your Honor.

The Court: All right.

Mr. Jinkinson: I certainly hope that counsel doesn't contend to the Supreme Court that he has a right to come back and put more evidence in, because he has got every opportunity in the world to put it in.

Mr. McLaren: I have just told you what I intend to contend if there should be a reversal of the Court's decision.

Mr. Jinkinson: All I can say is that I am urging you to put in any defense you have on territorialization in this record.

The Court: I think the record clearly shows that you have urged him on everything but your bended knee to put in more evidence.

Mr. Jinkinson: That is right.

The Court: And I think the record shows why he hasn't put any in. And I am not concerned with what the Supreme Court says three years from now, because I don't even know what they are going to say tomorrow. I haven't got [fol. 101] the Federal Reporter and I don't know what they said yesterday, but I am sure it wasn't what they said the day before yesterday.

So now where are we? Defendant rests.

THEREUPON THE DEFENDANT RESTED ITS CASE IN CHIEF

Mr. Fink: If he has rested, the Government will put in a rebuttal case.

The Court: All right, that is what I am waiting for.

Mr. McLaren: If your Honor please, may I ask a preliminary question of the Government? Are there any other of your proposed witnesses in the Court?

Mr. Fink: Yes, in court, yes.

Mr. McLaren: We would like to invoke the Rule, your Honor.

Mr. Jinkinson: I didn't invoke it on you. I don't know why you can invoke it now.

Mr. McLaren: You had that privilege.

The Court: Maybe you are more of a gentleman than he is, Mr. Jinkinson, and the rule will be invoked. Have your witnesses step out. There is a witness room right around the corner there.

[fol. 102]

March 17, 1964

The Clerk: Has Jinkinson given up?
Is the witness more loquacious than the one we had yesterday.

Mr. Jinkinson: I don't think so, your Honor. I don't think it's possible—at least I've never seen one that is, your Honor.

Mr. Fink: Your Honor, we call Mrs. Gloria Bennett, please.

The Court: Up here, please.

GLORIA S. BENNETT, a witness called by and on behalf of the Government in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Fink:

Q. Please state your name.

A. Gloria S. Bennett.

Q. Would you state your address, please, Mrs. Bennett.

A. 9900 East Bexhill Drive, Kensington, Maryland.
[fol. 103] Q. What is your occupation, Mrs. Bennett?

A. I am the furniture manager and secretary-treasurer of the U. S. Merchandise Mart Incorporated.

Q. And where is the U. S. Merchandise Mart Incorporated located?

A. Washington, D.C.

Q. Is the U. S. Merchandise Mart a retail store?

A. Yes. We sell to the public brands of furniture, carpeting, appliances and bedding.

Q. How long have you held your position at the U. S. Merchandise Mart?

A. Since 1951, approximately '51.

Q. How many stores does the U.S. Merchandise Mart have?

A. At the present, there are two.

Q. Have you ever had any others?

A. We've had branch stores in the past.

Q. And where were they located, do you know?

A. Pensacola, Florida, Fort Walton Beach, Florida, Annapolis, Maryland, and at present one in Arlington, Virginia.

[fol. 104] Q. Have you ever had any occasion to buy Sealy mattresses or Sealy products from the Sealy Mattress Company of Baltimore, Maryland?

A. Yes.

Q. When was the first time that you purchased mattresses from the Sealy Mattress Company of Baltimore, Maryland?

A. During the year of 1955.

Q. Did you buy these mattresses for resale to consumers?

A. Yes.

Q. Does your store customarily sell mattresses and other articles at a price less than that normally suggested by manufacturers?

A. Well, we sell at a fair price, yes.

Q. Is it normally considered a discount price off of the suggested retail—

A. No. We handle quality lines and brands of merchandise, and we sell at a price that we consider a fair price.

The Court: It is your judgment that it is a fair price; is that it?

The Witness: That's correct.

[fol. 105] The Court: All right.

By Mr. Fink:

Q. And this price is sometimes less than that suggested by manufacturers as the fair price?

A. Yes, yes.

Q. Are you still purchasing Sealy mattresses from the Sealy Mattress Company of Baltimore?

Mr. McLaren: If your Honor please, if I may interpose an objection on two grounds; first, that this is not proper rebuttal but should have been brought in their direct case; I find that the U. S. Merchandise Mart, which appears to be the same organization Mrs. Bennett represents, played a part in the Government's direct case; among others GX 513, 515, 516, 521.

And if your Honor please, the additional objection beyond the one presented yesterday is that this evidence, as I understand, went in in connection with the territorial aspects of the Government's case.

[fol. 106] Now, it seems to me, your Honor, that this is exactly what Wigmore refers to in the sense of fragmentizing the proof.

Secondly, we did not put in evidence of any sort, of course, on the territorial issue.

[fol. 107] The Court: I haven't heard anything yet and I don't anticipate hearing anything in regard to territorialization from this witness. And your objections are overruled.

All right.

Mr. Fink: Would you please read the last question back to the witness.

(Question read.)

By the Witness:

A. No.

By Mr. Fink:

Q. When did you cease buying—or first cease buying mattresses from the Sealy Mattress Company of Baltimore?

A. Well, we first stopped buying them late '56 or early '57.

Q. You are not sure of the exact time?

A. No, I'm not.

Q. Would you tell me how you became aware, you personally became aware that you had ceased to purchase mattresses from Baltimore?

A. I was visiting our branch store in Pensacola, Florida, and I received a message stating that we had been cut off [fol. 108] by Sealy, and they would no longer supply us with their mattresses.

Q. What did you do then, if anything?

A. I was terribly upset, and I sent a telegram immediately to Baltimore from Pensacola.

Q. I show you a document marked Government Exhibit 1168 for identification. Do you recognize that?

A. Yes.

Q. The name is Gloria S. Bennett, U. S. Merchandise Mart.

A. This is my name.

Q. Did you send this telegram?

A. Yes. I phoned the message in to the Western Union Company, and this is a copy.

Mr. Fink: Your Honor, the Government offers Government Exhibit 1168 for identification, being the telegram to Mr. Marty Rudick, care of Sealy Mattress Company of Baltimore, and from Gloria S. Bennett, U.S. Merchandise Mart.

Mr. McLaren: I take it, your Honor, that this is restricted to the price aspect of the case?

[fol. 109] The Court: I so assured you.

Mr. McLaren: All right. We object to its being received on any basis.

The Court: I understand, on the grounds heretofore mentioned. The objection is overruled.

(The said document, so offered and received in evidence, was marked Government Exhibit 1168.)

By Mr. Fink:

Q. Would you please tell us if you did anything else after this period?

A. Upon my return to Washington a week later, we had correspondence with Sealy Mattress Company.

Q. I show you Government Exhibit No. 1169 for identification, which is a letter. This is addressed to Mr. Norman Bennett. Would you tell us who he is?

A. Mr. Norman Bennett is the president of the U.S. Merchandise Mart.

Q. Did you see this letter?

A. I did.

Q. Did you receive this letter from Marty Rudick?
[fol. 110] A. This letter was received from Mr. Marty Rudick of the Sealy Mattress Company in Baltimore.

Mr. Fink: Your Honor, at this time I offer Government Exhibit 1169 for identification, being a letter written to Norman Bennett from Marty Rudick, Sealy Mattress Company, and dated July 27, 1956.

Mr. McLaren: If your Honor please, I believe that this exhibit, if it is a letter dated—what?

Mr. Fink: This is the one of July 27th.

Mr. McLaren: This letter dated July 27, 1956, so far as I can see, refers entirely to territory.

Mr. Fink: Your Honor, it is true that this relates to territory. We are only placing this in as a background to the situation that she is going to testify to, which is entirely for our purposes relating to price, and particularly to the testimony that has been given on the defendant's case.

Now, the only reason we are putting this in is, we feel without it her testimony will have great gaps in it. And [fol. 111] Mr. McLaren would be able to argue to us that, well this isn't—that the reasons we place forward for her being cut off at one time were not the real reasons, but that the reasons placed forward in these letters were.

The Court: On your assurance that this is mere background approaching the subject matter on which we are having this hearing—that is the price subject matter—I will permit it in, again with the same assurance to Mr. McLaren that I have heretofore made in regard to background—I mean, in regard to territorialization.

By Mr. Fink:

Q. In response to this letter, did you do anything?

A. We answered the letter and agreed not to ship merchandise out of the territory.

Q. All right.

Mr. McLaren: I move to strike, your Honor.

By Mr. Fink:

Q. I show you Government Exhibit 1170 for identification—
[fol. 112]

The Court: Move to strike—for the same reason?

Mr. McLaren: Yes, sir.

The Court: The objection is overruled. I still consider this merely background. If it later develops that this doesn't lead to something, renew your motion. But your objection at this time is overruled.

Mr. McLaren: Your Honor understands our position, I am sure. May we have a continuing objection, and we won't have to interrupt.

The Court: All right.

By Mr. Fink:

Q. I show you Government Exhibit 1170 for identification. It is written from Norman Bennett to Mr. Marty Rudick. Did you in any way help to prepare this letter?

A. I typed this letter.

Q. Did you send this letter—did you personally send this letter?

A. I mailed this letter to Mr. Rudick.

Mr. Fink: Your Honor, the Government offers Government Exhibit 1170 for identification, dated August 21, 1956, to Mr. Marty Rudick, Sealy Mattress Company in Baltimore, from Norman Bennett.

The Court: The objection is overruled. It may be received.

(The said document, so offered and received in evidence, was marked Government Exhibit 1170.)

[fol. 114] Q. Did you receive any further correspondence on this—as to this conversation or transaction?

A. Yes, there is more correspondence.

Q. I am going to show you Government's Exhibit No. 1171 for identification; it is written to Mr. Norman Bennett. It is from Marty Rudick. Are you familiar with that document?

A. Yes.

Q. Did you receive that document?

A. Yes.

Q. Did you receive that document?

A. We did.

Mr. Fink: Government offers Government Exhibit No. 1171 for identification.

The Court: The objection is overruled and it may be received.

(The said document, so offered and received in evidence, was marked Government's Exhibit 1171.)

Mr. McLaren: Is that the letter of August 29?

Mr. Fink: Yes. I am sorry, Mr. McLaren, August 29, yes.

[fol. 115] By Mr. Fink:

Q. In response to this letter what, if anything, happened?

A. We agreed not to ship the merchandise out of the Washington—

Q. How did you do that?

A. —area.

Q. By what means?

A. By correspondence.

Q. I show you Government's Exhibit 1172 for identification; would you read that, please.

It is a letter written to Mr. Marty Rudick from Norman Bennett. Did you aid in the preparation or mailing of this?

A. Yes, I personally mailed this letter.

Mr. Fink: Government offers Government Exhibit No. 1172 for identification.

The Court: The objection is overruled and it may be received.

(The said document, so offered and received in evidence, was marked Government's Exhibit 1172.)

By Mr. Fink:

Q. Mrs. Bennett, after you agreed to stop shipping out [fol. 116] side of the territory, did you have any conversations with anyone from Sealy Mattress Company, representing Sealy Mattress Company of Baltimore, Maryland, or Sealy, Inc., regarding the prices at which you were to sell your Sealy products?

Mr. McLaren: Objection, your Honor, on the hearsay ground. Also, I believe Mr. Fink misspoke. He said, "Sealy, Inc."

The Court: Read the question, Mr. Reporter.

(Question read.)

The Court: Overruled.

By the Witness:

A. Yes.

By Mr. Fink:

Q. Who did you have the conversation with?
A. The sales representative named Mr. Victor Barnett.
Q. And where did this conversation take place?
A. In my store in Washington, at my desk.

The Court: Who is Mr. Victor Barnett?

The Witness: He is a sales representative who handled
[fol. 117] our accounts with Sealy Mattress Company.

By Mr. Fink:

Q. Had you met him on other occasions?
A. Yes, he had called on us regularly!
Q. Did he try to sell you mattresses on these other
occasions?

A. Yes.

Q. Had he ever given you a card or anything else indicating that he came from the Sealy Mattress Company?

A. Yes.

Q. I was going to ask you that, too; is Mr. Barnett known to you to be employed by the Baltimore licensee?

A. Yes.

Q. When did this conversation take place, to the best of your recollection?

A. Late '56 or early '57, I cannot get the exact time at this point. We had a very serious fire in our store and some of our documents are not available to us, and this is the reason I cannot be more specific. We had a fire in 1959 that destroyed records.

[fol. 118] Q. Who else was present at that time?

A. Employees, my sales staff, and after I received a message from Mr. Barnett, I called my husband, Mr. Norman Bennett, who is the president, because this was trouble.

Q. Do you recall the names of these employees that were there in your place?

A. I could get them if necessary from payroll records, but we have many employees and we have a turnover and I cannot give specific names at this moment.

[fol. 119] Q. Would you please tell me what, if anything, was said by those present?

Mr. McLaren: If your Honor please, same objection we raised yesterday. There is no showing of any authority

by the salesman of the Baltimore licensee to make any sort of statements of policy or any other thing, reason for dealing or not dealing or any other type of statement that would be binding upon Sealy, Incorporated.

The Court: The objection is overruled.

By Mr. Fink:

Q. The question was, would you tell the Court if anything was said by those present?

A. Mr. Rudick—Mr. Barnett came in to tell me that Sealy would no longer be able to sell us merchandise.

Q. Was anything else said?

A. Yes. I was floored. I immediately called my husband because this is trouble, and some of my employees. He said that we were not selling at their \$79.50 price and, therefore, we were being cut off and that he was just as [fol. 120] upset as we were about it.

Q. Did he tell you anything about them shopping you or shopping anybody?

A. Yes, Mr. Barnett said the Wilmot Shopping Service had been hired to go around and check dealer accounts to see if the \$79.50 price was being maintained and he showed me a list of stores and dealers, rather, in the whole area, that were also going to be cut off by Sealy Mattress Company.

Q. Did he talk about the price—was he talking about your store in Washington, D.C.? Was that included?

A. He was talking about my store in the area. We had already agreed not to ship to our Florida stores anymore.

Q. At that time was there anything else said—I am sorry—was there anything else said during this conversation that you can recall?

A. I was in such shock at this point in losing the line because we had done such a wonderful job with them, we had such a good volume with them, that he was really up [fol. 121] set about losing our account.

Q. How much a year was your volume? What volume of purchases did you buy from Sealy Mattress Company in Baltimore?

A. The purchases amounted between twenty to twenty-five or thirty thousand dollars a year.

Q. Did you ever thereafter have a conversation with any one from the Sealy Mattress Company of Baltimore, Maryland?

A. Yes. At intervals I made calls requesting an order be filled because I had a customer who had previously purchased this bedding from us and wanted to add an outfit, but they would never accept my orders.

Q. Did you ever have any further—

The Court: After this conversation—this question hasn't been asked—am I to understand that you were cut off?

The Witness: Yes, sir.

The Court: All right.

By Mr. Fink:

Q. After this conversation, however, did you ever obtain any more mattresses from the Sealy Mattress Company of—

[fol 122] A. Yes.

Q. Did you have any conversation regarding the obtaining of these mattresses with anyone from—

A. Yes.

Q. —from Sealy Mattress Company of Baltimore? Your answer is still yes? I just added, "Did you have a conversation with anyone from Sealy of Baltimore?"

A. Yes.

[fol. 123] Q. Would you tell me who you had a conversation with there?

Mr. McLaren: Same objection, your Honor.

The Court: The same ruling. I would like to have the time and place fixed.

Mr. Fink: Well, I will, sir.

By the Witness:

A. Later in '57—

By Mr. Fink:

Q. In 1957?

A. I was visited by two people; Mr. Ben Mills brought in another sales representative of Sealy Mattress Company named Mendez Morstein.

Q. Who is Ben Mills?

A. Mr. Ben Mills—I have been led to believe that he is the plant production manager of making Sealy beds and mattresses and springs in Sealy of Baltimore. This is my understanding of his position with Sealy. He introduced me to Mr. Mendez Morstein who was his new sales representative in my area.

Q. Where did the conversation take place?

A. At my store on 14th Street.

[fol. 124] Q. And who else was present?

A. My sales staff, the ladies in my sales department.

Q. What, if anything, was said by those present?

A. I was told that—

Mr. McLaren: Same objection.

The Court: Overruled.

Go ahead.

By the Witness:

A. They would like to resume doing business with us again.

By Mr. Fink:

Q. Who told you this?

A. Mr. Ben Mills and Mr. Mendez Morstein.

Q. What, if anything else, was said?

A. Yes, they would like me to handle the line again. They missed our business and they would like to reopen our account, and I was delighted because I was suffering from the loss of this line because so many people were still asking. We had pushed this as our No. 1 line and I was delighted that they would come back.

Q. Was anything else said?

[fol. 125] A. Yes, I was also told that I could have the entire line except I could not have the Posturepedic line, which is the top of their line, unless I sold it for \$79.50.

Q. Who told you that?

A. Mr. Mendez Morstein and Mr. Ben Mills.

Q. Was anything else said at that time?

A. I told them that I could not sell and I would not sell the Sealy Posturepedic for \$79.50.

Q. At that time, did anyone in the room do anything else or did you have any other conversations, or was that it?

A. Yes, I discussed the line with the sales representative and he said that he had another mattress that he would give me that would be the same as Sealy Posturepedic and it would be called Health Guard, and I asked him to please type me up the specs on this Health Guard because when we sell our bedding we have got to know what the coil count is and the core and the density of rubber and all of the details and specs on these units that he wanted me to sell.

Q. I show you Government's Exhibit No. 1173 for identification. It is a document that has American Home Furni- [fol. 126] ture Carpeting and Bedding, with a Washington address heading on this.

A. This is a division of the U. S. Merchandise Mart.

Q. This is on your stationery?

A. This is my stationery.

Q. Did you prepare this?

A. I did not.

Q. Who did?

A. Mr. Mendez Morstein sat at the typewriter and typed this list up and added the—wrote in the ink figures that are there.

Q. This list that you have here?

A. Yes.

Mr. Fink: Government offers Government Exhibit 1173 for identification.

Mr. McLaren: To the extent that this shows costs, which I take it to be cost to Mrs. Bennett and wholesale prices of the licensee, I object to the document, your Honor.

The Court: Let me see the document so that I can rule intelligently.

You are objecting to the wholesale costs?

[fol. 127] Mr. McLaren: Yes, your Honor. They are the pencil figures.

The Court: Pen or ink?

Mr. McLaren: Pen or ink, yes.

The Court: The objection is sustained to the pen or ink figures. The document other than that may be received.

Mr. Fink: Thank you, your Honor.

(The said document, so offered and received in evidence, was marked Government's Exhibit 1173.)

[fol. 128] By Mr. Fink:

Q. Are you still purchasing Sealy mattresses from the Sealy Mattress Company of Baltimore, Maryland?

A. No.

Q. Was that your decision or was that theirs?

A. This was my decision.

Q. Mrs. Bennett, in any of these conversations that we have talked about, and I include each and every one that we have talked about today, did any representative of Sealy Mattress Company, or Sealy, Inc., tell you that you were being cut off because you advertised at the wrong price?

A. No.

Q. At any time, did they chastise you in any way or argue with you in any way about your advertised price?

A. No.

Q. Did they tell you you were being cut off because you sold at the wrong price?

A. Yes.

Mr. Fink: That is all.

Your witness.

Mr. McLaren: I object to the later point, your Honor.

[fol. 129] It came out before I could get an objection. Were you told that by whom and when? Is this a reference to the prior testimony or is this something new?

The Court: Your motion is to strike the last question and answer?

Mr. McLaren: Yes, sir.

The Court: It will be sustained because it is repetitious, that is all. It is already in there in regard to this selling. You brought that out through these other conversations.

Mr. Fink: Do you have any cross?

Mr. McLaren: I think maybe we will.

May I take just a moment, your Honor?

The Court: Surely.

Mr. McLaren: If your Honor please, without waiving our objection, I would like to ask Mrs. Bennett some questions about this background information that went in.

The Court: I think the purpose of that was to—since [fol. 130] the first complaint had verged on territorialization, I think that this tended to eliminate the possibility that they were cut off because of the shipping of mattresses. They were cut off for another purpose, and I accept this evidence only in regard to eliminating the territorialization thing as the cause of the cut off. That is the purpose for which it has been received by the Court. You may ask her if you want.

Cross-examination.

By Mr. McLaren:

Q. Mrs. Bennett, your store in Pensacola, now, that took orders from people in the Florida area at the military airbases down there?

A. Yes.

Q. And then insofar as at least Sealy Merchandise is concerned you were shipping down there from Washington, D.C., isn't that right?

A. Yes.

Q. Now, you also had some stores in Virginia?

A. Arlington, Virginia.

[fol. 131] Q. And you had a store in Maryland, did you?

A. Annapolis.

Q. And did you ship from the store out to those two locations?

A. To the best of my knowledge, all of the merchandise was shipped from the Washington store, to the best of my knowledge, yes.

[fol. 132] By Mr. McLaren:

Q. Now, in Florida, in Maryland, and in Virginia, there are fair trade laws, aren't there?

A. Presumably.

Q. Now, when you shipped from Washington down to Florida and sold out of the store down there, that, shall we say, avoided the Florida fair trade laws—

Mr. Jinkinson: Your Honor, I object as being outside the scope of the direct examination.

The Court: No. The objection is overruled.

Mr. Jinkinson: I also object to calling for a legal opinion of the witness.

Mr. McLaren: I think Mrs. Bennett is very familiar with this particular area.

The Court: The objection is overruled.

By the Witness:

A. I'm not very familiar with this, sir, and I would prefer that you ask my husband, because this would be [fol. 133] his—the policies and shipping methods is in his jurisdiction.

The Court: Well, do you know that you did, or you don't know?

The Witness: I don't know.

The Court: All right.

By Mr. McLaren:

Q. But your prices, when you sold in these other areas, they were as you testified on direct—fair prices?

A. Yes, sir.

Q. They were not necessarily list prices, suggested list prices of the manufacturers?

A. Yes.

Q. And after you agreed that you weren't going to ship out of the greater Washington area, you still shipped to your Annapolis and—what was the other one?

The Court: Virginia.

By Mr. McLaren:

Q. (Continuing) and your Virginia store. Those you took to be within the area; is that right? [fol. 134]. A. To the best of my knowledge, yes.

The Court: Mrs. Bennett, you never testified what you did sell Posturepedics for in Washington, that you considered a fair price.

The Witness: From twenty to twenty-five per cent off of the suggested—

The Court: The \$79?

The Witness: The suggested \$79.50 price either delivery charges or freight charges.

The Court: All right.

By Mr. McLaren:

Q. And the same in Maryland and Virginia?

A. Yes.

Q. Now, are you familiar with the other stores in Washington that are sort of a discount type of operation?

Mr. Jinkinson: That is objected to, your Honor, as being outside the scope of the direct examination.

The Court: What is the purpose of this?

[fol. 135] Mr. McLaren: Well, I think perhaps, your Honor, that this witness might be able to testify that there are a number of other discount type operations in Washington, and that they do handle Posturepedics.

The Court: Well, I mean if she knows of her own knowledge, but not just hearsay, that somebody heard that.

By Mr. McLaren:

Q. Do you happen to know if that is true?

A. I do not know of my own knowledge.

Q. It may be true, as far as you know?

The Court: Anything may be true that you don't know. It may not be true too.

Mr. Jinkinson: You may step down, Mrs. Bennett.

(Witness excused.)

Mr. Jinkinson: Your Honor, the Government rests.

THEREUPON, THE GOVERNMENT RESTED

[fol. 136] Mr. Jinkinson: Your Honor, we are discussing—

The Court: You have no further evidence?

Mr. McLaren: We have no further evidence, your Honor.

* * * * *

[fol. 137] IN THE UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 60 C 844

UNITED STATES OF AMERICA, Plaintiff

vs.

SEALY, INC., Defendant.

FINDINGS OF FACT—October 6, 1964

Statement of Proceedings.

1. This is a civil action upon complaint of the United States of America (plaintiff) against defendant Sealy, Incorporated (Sealy) under 15 U.S.C. § 4 to prevent and restrain alleged violation by Sealy of the Sherman Act, 15 U.S.C. § 1 [Complaint, Para. 1]

2. Jurisdiction of the subject matter hereof and proper venue of the defendant hereto duly appear and are not contested. [Complaint, Paras. 1, 2; Answer, Para. 1]

3. The complaint herein was filed on May 31, 1960. It charges that Sealy and certain bedding manufacturers (not named, but designated as co-conspirators), licensed by [fol. 138] Sealy to manufacture and sell items of bedding under the Sealy trade names and trademarks, have engaged in combination and conspiracy in unreasonable restraint of trade in Sealy products in violation of Section 1 of the Sherman Act. Paragraph 16 of the complaint charges that the "combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among Sealy and the co-conspirators, the substantial terms of which have been that, with respect to Sealy products, they agreed:

"(a) That each member factory will sell Sealy products only within the exclusive marketing territory allocated to it, and will refrain from selling

Sealy products outside such exclusive marketing territory;

"(b) to fix uniform suggested retail prices, and to induce retail stores to adhere to such suggested retail prices, for the purpose of fixing and stabilizing the retail prices of Sealy products."

[Complaint, Paras. 3-5, 12-14, 15-16]

4. Defendant filed its answer on August 1, 1960. It denies the allegations of the charging paragraphs of the complaint; it admits that "Sealy licensees are licensed to [fol. 139] manufacture and sell Sealy products in specified geographical areas." [Answer, Para. 12] The definitions of "Sealy products" in both the complaint and answer exclude private label bedding, and there is no allegation that any licensee was restrained in any way in his manufacture or sale of products bearing his own label. [Complaint, Para. 10; Answer, Para. 6]

5. In its answer, defendant made the following affirmative statements in defense against the charges in the complaint:

"a. The provisions of the Sealy licenses and Sealy's administration of its advertising, merchandising and quality control programs, attacked by the complaint herein, are reasonably ancillary to the proper protection and exploitation by Sealy of its trademarks, trade names, patents, processes and manufacturing and merchandising techniques.

"b. The licensing arrangements between Sealy and its licensees are reasonable and necessary in order to enable said licensees (who are by United States Census definition 'small businessmen') to manufacture, nation-[fol. 140] ally advertise, and sell products of uniform quality under the Sealy trade names and trademarks and thereby to provide effective competition in the bedding industry, and in particular with the well-established, nationally-advertised brands of the corporate manufacturers of bedding; such arrangements are neither designed to nor do they have the effect of unreasonably restraining competition.

"c. The licensing arrangements between Sealy and its licensees do not restrict the manufacture and sale by Sealy licensees of non-Sealy bedding (so long as such

bedding is not passed off as a 'Sealy product'), and defendant avers upon information and belief that many of said licensees do in actual practice manufacture such non-Sealy bedding and sell the same both within and without their licensed territories.

"d. The licensing arrangements between Sealy and its licensees benefit the public through improved construction, uniformity in quality, reduced costs, and the additional competition which such arrangements enable Sealy [fol. 141] licensees to provide in the bedding industry.

"e. The bedding industry of which Sealy and its licensees are a part is characterized in all parts of the United States by a large number of manufacturers and an even larger number of brands and grades of bedding in numerous price ranges, by vigorous competition among manufacturers for the business of retail stores and among retail stores for consumer trade, and the arrangements between Sealy and its licensees have not unreasonably restrained such competition.

"f. The relief for which plaintiff prays is contrary to the public interest in that it would tend to destroy the ability of Sealy and its licensees to compete in the bedding industry and would tend to augment the already substantial market positions enjoyed by the corporate manufacturers of nationally advertised brands of bedding." [Answer, Para. 15]

6. The trial commenced on December 5, 1963, and it proceeded in several separate stages for sixteen trial days, concluding on March 17th.

[fol. 142] 7. Plaintiff's evidence in its case in chief was wholly documentary, consisting almost entirely of defendant's corporate documents, i.e., charter, by-laws, stockholders, directors and committee minutes, and correspondence from its files.

8. At the close of plaintiff's case in chief, defendant filed a motion for judgment of dismissal under Rule 41(b) of the Federal Rules of Civil Procedure, and oral argument was had thereon. The Court made the following ruling and comment: "the motion to dismiss at the end of the Government's case is overruled. However, let me say that should there ever be a decree there will be nothing in it

finding that the territorialization, in my opinion, is a violation of the antitrust laws. . . ." [R. 2575]

9. In its defense, Sealy presented testimonial and documentary evidence expressly limited to the price allegations of Para. 16(b) of the complaint, and at the close of the trial it has renewed its motion to dismiss the territorial allegations of Para. 16(a) of the complaint under Rule 41(b). [see R. 3366-70]

10. While the complaint charges a single conspiracy, plaintiff's evidence was presented in segments relating either to the charging paragraph alleging territorial re-[fol. 143] strictions or the charging paragraph alleging price restrictions, and these two aspects of the complaint are severable. As the attorney for the plaintiff said in oral argument upon defendant's motion to dismiss:

"There are only two issues in this case; one, have the defendants conspired to fix prices; two, have they conspired to allocate territory." [R. 2517]

Similarly, in his opening statement, counsel for plaintiff said:

"The defendant, Your Honor, would like to make this a complex matter. There is, however, Your Honor, only one conspiracy consisting of *two charges* or terms of the conspiracy in this case. The first is that the defendant conspired to fix prices, and the second is that the defendant was engaged in a conspiracy to divide territories. Thus, there are two set of *facts*, the existence or non-existence of which are all that need be ascertained." (Emphasis added) [R. 11]

The Defendant

11. Sealy, Incorporated is a Delaware corporation with its headquarters and principal place of business in Chicago, Illinois, [Complaint, Para. 3; Answer, Para. 3]

12. Sealy's principal business is the licensing of approximately thirty bedding manufacturers (Sealy licensees) to manufacture and sell mattresses, foundations and other items of bedding under the Sealy name and Sealy trademarks in accordance with prescribed specifications, in

[fol. 144] various parts of the United States. [Complaint, Para. 12; Answer, Para. 8; GX 1107, Interrogatory 7, R. 2369]

13. Sealy licensees pay royalties to Sealy for the privilege of using the Sealy name, trademarks, patents and processes [GX 31E, R. 273]; Sealy's royalty income in 1958 was \$1.2 million, and in 1959, \$1.4 million. [GX 1107, Interrogatory 7, R. 2369]

14. Sales of bedding by all Sealy licensees were \$56.6 million in 1957, \$56.4 million in 1958, and \$58.6 million in 1959. During these three years, the annual sales of individual licensees ranged from a low of \$533,000 to a high of \$6.5 million. In only one of these three years were there as many as five licensees with sales in excess of \$3 million, and in each of the other two years about three-fourths of the licensees had sales between \$1 million and \$3 million. [GX 1107, Interrogatories 8 and 9, R. 2369]

Part One

The Alleged Conspiracy to Divide Markets and Eliminate Competition is Refuted by the Record Evidence

15. Plaintiff's basic contention is that defendant's territorial licenses were entered into for the purpose of dividing territories and eliminating competition among the Sealy licensee manufacturers and that, as such, they are *per se* [fol. 145] illegal. Defendant claims, on the other hand, that the territorial provisions of its licenses were merely ancillary to the several entirely legitimate business purposes of the Sealy licensing arrangements, and that they do not unreasonably restrain trade in violation of the Sherman Act. In support of its position, defendant cites the origin, history, and development of Sealy and its predecessor companies, the evidence of their lawful commercial activities, and the complete absence of evidence of an unlawful purpose to divide markets and eliminate competition.

I. Early History of Sealy Under Sugar Land Industries

16. The evidence does not show the origin of the Sealy mattress or its manufacturers, but there is a reference

in a registered trademark to the continuous use and application of the "Sealy" mark on bedding since 1889. [GX 987, R. 2272]

17. The record also contains several trademarks for mattresses that were registered by the Sealy Mattress Co., of Sugar Land, Texas, in 1918. [GX 987, R. 2272] The evidence identifies Sealy Mattress Co. in 1923 as the name of the mattress department conducted by Sugar Land Industries (Sugar Land), a trust estate (a form of business organization). [GX 2, p. 3-7111, R. 124]

[fol. 146] 18. In 1923, Sugar Land Industries entered into an option agreement with E. E. Edwards. This contract stated that Sugar Land owned "the trade name of 'Sealy Mattress Company' and various patents, trademarks, copyrights, trade names, and good will connected with the business conducted by . . . [Sugar Land] under the name of Sealy Mattress Company," and including trademarks registered in 1892 and 1895. The contract further stated that Sugar Land had entered into numerous license contracts with mattress manufacturers "in different parts of the United States," giving them the right to manufacture and sell mattresses under Sealy trade names and trademarks in exchange for the payment of royalties to Sugar Land. The contract gave Edwards the option to purchase the trade name of Sealy Mattress Company and all of the intangible assets of Sugar Land's mattress department, including the license contracts with other manufacturers, for \$150,000. [GX 2, p. 3-7111, R. 124]

II. Sealy Corporation

A. Organization of Sealy Corporation by E. E. Edwards.

19. E. E. Edwards appears throughout the early history of Sealy as shown in the record. In January 1925, he was chairman of the sixth semi-annual general convention of the Sealy mattress factories. In the minutes of that meeting, which were signed by Edwards, he summarized the comments he had made at the meeting on his plan to purchase the patents, trademarks and good will of Sealy Mattress Co. He further stated that Thomas H. Cobbs, an attorney from St. Louis who had worked with him for the past three years on the Sealy plan, was present

at the meeting. The plan envisioned organization of a new corporation, made up of Sugar Land's Sealy licensees, to take advantage of Edwards' option and purchase the intangible Sealy assets from Sugar Land. [GX 1(10), pp. 3-7084, 7093, R. 112]

20. A contract Edwards entered into with each Sealy licensee of Sugar Land prior to 1925 contained the statement that Edwards and his associates had been working for about seven years on a plan to organize a corporation to take over Sealy, "so that the name could be advertised and used for the benefit of all those manufacturers who hold license contracts, for the manufacture and sale of Sealy mattresses." [GX 2, pp. 3-7110, 7113, R. 124] The contract provided for the renewal of the Sealy licenses with the new corporation, for the election of Edwards as president, and for the licensees to receive three-fourths of the stock while Edwards and his associates received one-fourth of the stock of the new company "for his services in working out the plans for said organization, and pro- [fol. 148] moting the same." [GX 2, p. 3-7114, R. 124].

21. The evidence indicates that E. E. Edwards was with the Sealy Mattress department of Sugar Land, and that he originated and promoted the idea of creating a separate corporation to own the Sealy name and intangible assets and to continue to license mattress companies to manufacture and sell Sealy bedding. The impetus for the organization of Sealy Corporation in 1925 came from E. E. Edwards, who stood to make a substantial profit from his 25% of the stock if the new corporation were successful, and who had little or no personal liability if it were not.

22. Sealy Corporation was incorporated in Illinois in 1925; the incorporators and first formal Directors for purposes of incorporation were E. E. Edwards, who was elected president, Thomas H. Cobbs, the company's counsel, and William Hertz, an advertising man who became general manager in charge of the Chicago headquarters office. [GX 2A, pp. 3-7097-99, R. 151; GX 1(10), p. 3-7093, R. 112; GX 2, p. 3-7110, R. 124]. The corporation proceeded with its plans as outlined above, with Edwards exercising his option and directing transfer of the intangible assets of Sealy Mattress Co. to Sealy Corporation in exchange for six promissory notes for \$25,000 each from Sealy Corporation.

[fol. 149] to Sugar Land. Stock in Sealy Corporation was issued as planned, and the stock was turned over to Sugar Land, along with a conditional reassignment of the assets, as security for the notes. [GX 2, pp. 3-7110, 7119, R. 124]

B. Purposes of Sealy Corporation.

23. The "object for which it is formed" was announced in the Statement of Incorporation of Sealy Corporation, as required for incorporation. In addition to reciting purposes to manufacture and sell and advertise bedding and other goods, the statement of objects begins with these most pertinent purposes:

"... to acquire, own, hold, use, buy, sell, lease, mortgage and otherwise deal in patents, trademarks, copyrights, trade-names, labels, brands, and all rights and interests therein; to license others to use, make, manufacture and sell merchandise under patents, trademarks, copyrights, trade-names, labels and brands...."

[GX 2A, p. 3-7098, R. 151]

24. At regular meetings of the Sealy licensees, first convened under Sugar Land's Sealy Mattress Co. and continued under the successor corporations, a number of subjects of legitimate interest to the licensees were discussed and put into practice. For example, at the same meeting in January 1925 at which Edwards and the licensees discussed the forthcoming incorporation of Sealy Corporation and the purchase of "Sealy" from Sugar Land, the following matters were considered: The possibility and advisability of arrangements to finance retail dealers; the specifications for composition of the filler material for mattresses; methods of grading cotton linters for purchase and use in mattresses, the trend of the market price of linters, and the appointment of a committee for joint purchasing of cotton linters; uniform methods of wrapping and packaging mattresses, and the testing of various types of cartons; uniform design and central purchasing of Sealy labels; group insurance for employees, viewing and purchasing metal beds manufactured for Sealy licensees under Sealy names by an outside manufacturer; development of improved Sealy bedsprings and of a new

grade mattress; sales presentations by outside manufacturers of twine and machinery; and advertising and promotion, including a national advertising campaign, window displays, retention of display space in the Chicago Furniture Mart, and participation in national hotel exhibitions. [GX 1(10), R. 112]

25. Similar topics were considered at the next semi-annual meeting of Sealy licensees, in June 1925, at which attorney Cobb reported that incorporation of Sealy Corporation [fol. 151] had been completed and the stock issued; for example, the discussion concerned such matters as national magazine ads, joint purchasing, designs and specifications, promotional materials, packaging, and infringement of the Sealy name by a non-licensee manufacturer located in Sealy, Texas. [GX 4 (23), R. 157] This evidence negatives the existence in the origin of Sealy Corporation of a central conspiratorial purpose to divide the United States among competing mattress manufacturers.

26. Continuing to the time of the reorganization of Sealy in 1933, which will be described below, the same kinds of subjects principally engaged the interest and attention of Sealy Corporation and its licensees. For example, at the nineteenth semi-annual meeting of Sealy's executive committee in December 1932, at which there was discussion of the depression-caused financial difficulties of its licensees, and therefore, of Sealy Corporation, and of the possibility of a reorganization, there was also consideration of the following matters: The possibility of changing the royalty basis from licensees' sales to the circulation of national publications in licensees' territories, because, as one licensee put it, "the primary purpose of the organization is to secure [fol. 152] national advertising, and that mainly is what each factory secures from the Sealy Corporation"; the desirability of signing enough licensees to operate Sealy factories in 47 cities because, as stated in the minutes, "it was unanimously conceded that the mattress business is very nearly a local business, and it is practically impossible for a foreign factory to go into a local territory and secure any profitable business"; proposed advertising expenditures; the desirability of Sealy employing sales managers and production engineers to visit licensees and consult with them about promotional and production ideas and problems; the semi-

annual promotion and special promotional ideas; and joint purchasing. [GX 7(19), R. 165]

C. Territorial Restrictions in Sealy Licenses.

27. There is no dispute over the fact that the Sealy licenses contain provisions assigning to each licensee an exclusive territory, in which Sealy agrees not to license any other person to manufacture or sell "Sealy products," and outside of which the licensee agrees not to manufacture or sell "Sealy products"; it is also undisputed that "Sealy products" include those manufactured according to Sealy specifications and sold with a Sealy label, and that there [fol. 153] are no restrictions upon the areas where licensees can manufacture or sell their own-brand products as long as they are not passed off as Sealy products. [GX 1012-18, R. 2349, 2354; GX 1020-1106, R. 2354, 2358, 2360, 2361; see GX 74, pp. 3-1487-88, R. 509, and GX 75, p. 3-1482, R. 512, in which the Sealy Board of Directors, meeting in 1954, discussed the question of private brand sales in contiguous territories; then president E. H. Bergmann said that competition between Sealy products and licensees' private brands was permitted in the license contracts, expressly or by implication, and what was prohibited was "sale of private brand merchandise directly or indirectly, under the Sealy banner, or using the Sealy name or prestige in any way to merchandise or sell private brand merchandise."] A territorial provision like this has been in the Sealy licenses from the beginning of the licensing of the Sealy name and trademarks by Sugar Land Industries in the early 1920's.

28. The earliest territories were assigned on the basis of freight rates, with the boundary between any two licensees being the point at which the shipping cost from their factories became equal, so that farther shipment by either licensee would result in a higher shipping cost than a ship- [fol. 154] ment to that location by the other licensee. A list in evidence entitled "Territory Outline License Factories Per Contracts," with a 1925 date on it, shows the area covered out of each of twenty-six cities; the first city listed is typical of all of them, providing as follows:

"RICHMOND, VIRGINIA: Richmond and all adjacent territory in every direction until Richmond railroad freight rates meet lower ones from Mebane, Louisville, Cincinnati, Pittsburgh and Baltimore." [GX 27, p. 3-7252, R. 250; see GX 4(23), p. 3-7128, R. 157, re the existence of 26 licensees]

Each of these cities appears in the record as a city where Sealy licensed a manufacturer. GX 27 also contains marginal dates in connection with some territories, some as early as April 1923. [pp. 3-7253, 7256]

D. Disputes over Territorial Borders.

29. Border disputes arose almost immediately, and as early as April 1925, while Sealy Corporation was still being organized, a dispute between the Richmond and Atlanta licensees gave rise to an expression of sentiment at an Executive Committee meeting that boundaries should be made definite and not left to be determined by changing freight rates. [GX 21, p. 3-7020, R. 229] A motion that [fol. 155] territories be permanently fixed was passed at the Sealy semi-annual meeting in June 1925, and at the meeting in January 1926 this was made firm by a motion that disputed territory boundaries be fixed according to first class freight rates on January 1, 1926, if no fixed boundary is specified in the license contract. [GX 4(23), p. 3-7126, R. 157; GX 11(28), p. 3-7135, R. 182; GX 26, p. 3-7040, R. 247; GX 13(31), p. 3-7161, R. 193, 195]

30. Disputes over boundaries were settled by Sealy Corporation, which had a contract containing territorial provisions with each licensee, and therefore, could not disassociate itself from such disputes. However, in the settlement of such disputes Sealy encouraged discussions and negotiations among the licensees affected, so that there could be an attempt to reach amicable settlements. When a dispute reached the point at which Sealy had to decide the disagreement or interpret its contracts, then the licensees involved could not participate in Sealy's decision even if they were members of the Sealy Board of Directors or Executive Committee. For example, in a continuing boundary dispute between the Seattle, Washington, and Tigard, Oregon,

licensees [GX 29, pp. 3-7046-47, R. 254], the Sealy Executive Committee was unable to act at a 1927 meeting because [fol. 156] the exclusion of Mr. Bowersox "by reason of his being a party to the contracts in question" resulted in the absence of a quorum; the matter, therefore, came before the January 1927 stockholders' meeting, and a decision was made to leave the two contracts in question unchanged. [GX 12(30), p. 3-7156, R. 187]

E. Expansion by Sealy Corporation.

31. Sealy Corporation was not content to stop with the number of licensees secured by Edwards while he was with Sugar Land. On the contrary, specific plans were made to try to increase the number of licensees in order to fully cover all parts of the country, to increase the potential advertising budget, and to exploit the national advertising of the Sealy name and trademarks. In 1932 executives of Sealy were selected to work in various sections of the country, where they would visit prospective licensees to promote their acceptance of Sealy license contracts. [GX 7(19); pp. 3-7213, 7216-18, R. 165] This was not the kind of activity that could reasonably be expected of an organization formed or operated to divide the country among a group of competitors, as Sealy is alleged to have been.

[fol. 157] III. Reorganization of Sealy Corporation into Sealy, Incorporated

32. At the time of the Executive Committee meeting in December 1932, only eight Sealy licensees remained, presumably because of the business failures caused by the depression, and there was discussion of the financial difficulties of some former licensees and their indebtedness to Sealy Corporation. The evidence shows that Sealy Corporation defaulted on the notes payable to Sugar Land, and they were taken up by Sealy Mattress Company of Texas, E. E. Edwards' licensee company. [GX 7(19), pp. 3-7210-11, R. 165]

33. At the same meeting, the Executive Committee discussed reorganization of a company to succeed Sealy Corporation as owner of the Sealy name, trademarks, patents and good will originally purchased from Sugar Land. It

was generally agreed that the basis for royalty payments by licensees should be changed from a per cent of sales to a pro rata amount of national advertising dependent upon the circulation of national publications in each licensee's territory. [GX 7(19), pp: 3-7211-12, 7214, 7215-17, R. 165]

34. At the Executive Committee meeting in July 1933, Edwards, as president of the practically defunct Sealy Corporation, was directed to proceed with incorporation of the new organization, to be known as Sealy, Incorporated. It [fol. 158] was to be incorporated for \$150,000, the amount paid to Sugar Land for the intangible Sealy assets. [GX 8(20), p. 3-7228, R. 173]

35. The incorporation was accomplished in August 1933 [GX 31A, R. 263], and Edwards was elected president of Sealy, Incorporated (the present defendant). [See GX 9, p. 3-7236, R. 174]

A. Purposes and Operations of Sealy, Inc.

36. After the reorganization in 1933, Sealy continued to operate much the same as it had prior to the reorganization. Some of the subjects discussed at the Sealy meeting in June 1936 were the following: Rewriting specifications of standard Sealy mattresses with respect to number of coils, type of cover, use of Sisal, etc.; preparation of mat books for distribution to licensees for advertising; and specifications and names of promotional pieces. The minutes of this meeting contain a reference to the election of H. E. Wolf to the presidency of Sealy, and the organization of the office of the corporation in Pittsburgh. [GX 31F(594), pp. 3-6653-54, 6657, 6662, R. 282]

37. At a meeting of the Sealy Board of Directors in November 1937, Earl Bergmann, then representative of the Cleveland licensee, stated that it was absolutely essential [fol. 159] if Sealy were ever to have national significance for all Sealy plants to make the same merchandise and prove to dealers that they are offering a thoroughly uniform product. [GX 36(602), p. 3-6842, R. 321; GX 946, p. 3-1916, R. 2135; see also GX 593 (31E, 32), p. 3-7248, R. 1359, in which it was decided at a Sealy meeting in July 1935 that the Sealy license contract would provide that each factory would manufacture Sealy products in strict accordance with specifications.]

38. In a "president's report" dated December 1939, H. E. Wolf cited what he considered some of the accomplishments during his presidency. He said that Sealy's first aim had been standardization, including such elements as the trademarking of all important Sealy names, setting up complete specifications for Sealy products, development of standard forms to simplify reports to Sealy headquarters, furnishing definite cost figures and specifications for promotions, and furnishing specific instructions for production of items involving special manufacturing processes. Wolf further stated that Sealy had developed many sales features for its licensees, such as Nukraft, a product of the Goodrich Company made available to Sealy plants, the Duralife unit developed by the Pittsburgh licensee with extensive research by the Memphis licensee, and the Posture [fol. 160] Pillow developed by the Sealy Executive Committee with experimentation at many Sealy plants, and with tests and research by Walter DeFries, Sealy's research engineer. Wolf mentioned the improvements in advertising and sales promotion, with the production of a catalog showing items of Sealy merchandise available throughout the country, the development of a mat portfolio containing a number of the most outstanding promotions developed by individual Sealy plants, creation of an effective newspaper institutional advertising campaign together with Sealy screen broadcasts, window displays and direct mail pieces, and the organization of a program of Sealy Sleep Shops. Wolf said that the licensees were well acquainted with Brody's work in connection with sales promotional efforts. He reported on Sealy's expansion in the areas of obtaining new licensees, securing the distribution of Firestone's Airtex, the availability of DeFries as research engineer, and expansion of Sealy's space at the American Furniture Mart in Chicago. In discussion future plans, Wolf proposed a more intensive advertising program, development of new bedding features, starting a strong campaign for hospital institutional business, simplifying the Sealy line, an intensive membership drive to fill in all gaps in the present Sealy national picture, and the accomplishment of economies through standardized [fol. 161] Sealy purchase of ticking, borders and similar items. [GX 46(945), p. 3-3221-26, R. 363]

39. In correspondence with W. J. Craig, a Sealy employee in the Chicago office, in November 1943, J. R. Haas, then president of Sealy, stated that he would not give the Chicago licensee or any other licensee permission to ship Sealy merchandise into unfilled territories without a definite agreement with the licensee that a specific royalty would be paid to Sealy for such shipments. He told Craig that if such service were rendered by any Sealy licensee, he wanted to be advised and to know that it was handled the way he wanted it handled, stating that as president of Sealy and, as such, the one responsible for its actions, he wanted to know what the corporation was doing. [GX 395, R. 1061; GX 396, R. 1059]

40. At a meeting of the Board of Directors in January 1951, then president Bergmann proposed a "Code of Sealy Ethics," which was adopted by the Board to be sent to Sealy licensees "for the purpose of establishing and maintaining friendly relationships between and among the contiguous Sealy plants." Some parts of the "Code" were restatements in layman's language of provisions in the license contracts. [GX 68(627), pp. 3-1653-54, R. 484; see, [fol. 162] e.g., GX 1056, p. 3-2187, R. 2358]

41. In January 1951, the Board of Directors established a procedure for "checking Sealy re-sale items manufactured by the plants for conformity to the specifications." This procedure involved the purchase of mattresses from retail stores in the franchised territory, which mattresses would then be examined to determine whether any licensee was violating Sealy's manufacturing specifications. If a violation was discovered, further purchases and examination would be made in the territory in question. Violations would be called to the attention of the Board of Directors. [GX 68(627), pp. 3-1651-52, R. 484] This procedure later came to be called the Vigilante Program, as noted in the minutes of meetings in 1954. [GX 638, p. 3-1508, R. 1491; GX 75, p. 3-1481, R. 512]

42. The president's annual report to the Sealy stockholders at the meeting in November 1953 did not even touch upon allocation of territories, but contained comments appropriate to a president's annual report to the shareholders of a corporation with regard to the following items: "Financial condition, income, net gains, dividends, sales,

expansion of personnel, new national headquarters, Sealy Sleep Products, Ltd. [a Canadian corporation], legal matters, and prospects for the future of the organization." [GX 1011, p. 3-5533, R. 2342]

43. E. H. Bergmann, as president of Sealy, developed various committees composed of licensees and employees on the Sealy staff, which reported to the Executive Committee and Board of Directors, and which served to plan Sealy advertising, promotions, manufacturing specifications and general growth of Sealy. [See Section IIIB, *infra*.] For example, at a meeting of the Board of Directors in April 1955, a number of questions arose with regard to various committees, as described in the following paragraphs. [GX 77(642, 979), pp. 3-1436-56, R. 517]

44. At its April 1955 meeting, the Board reviewed the size of the Advertising Committee.

"The president stated the primary reason for the size of this committee was to balance it between plant representatives doing a large resale and those doing a large promotional business. Also, he felt it was necessary to bring in people who were deemed to be advertising minded and to train new members." [p. 3-1437]

Bergmann recommended that the full Advertising & Merchandising Committee should consist of the chairman of the Executive Committee plus six regional members. M. A. Kaplan, the Chicago licensee, expressed the view that the primary objective of the Advertising Committee was:

[fol. 164] "To prepare and guide advertising policies of Sealy with reference to the amount of money available for expenditure. He stated the job of the chairman in his opinion is to organize the meeting to promote creative thinking among members. . . ." [p. 3-1438]

Kaplan felt that the committee members "should be creative and have directive ability with national effort in mind rather than local effort." A motion was made and passed that the president select a chairman for the Advertising Committee and meet with the chairman to pick committee members, not to exceed five. [GX 77(642, 979), pp. 3-1437-38, R. 517]

45. At its April meeting, the Board received the report of the Planning and Expansion Committee, which had been created in January 1954. The report stated the responsibilities of the committee as outlined by E. H. Bergmann, as follows:

"A. Study further requirements of Corporation and its Licensees.

"B. Establish goal and set up program of procedure.

"C. Recommend to the Board of Directors expansion of personnel deemed necessary to fill requirements of the Corporation, or additional services to member Licensees."

[p. 3-1446]

With respect to the Board of Directors, the committee said that it should at all times:

"consist of capable, energetic, ambitious and sound [fol. 165] thinking men, *who have the interests of Sealy, Inc., at heart*, and that *it is to the interest of Sealy, Inc.*, to use the talents and abilities of as many of its members as possible, therefore, the Board should be filled at all times with men of that caliber." (Emphasis added.)

[p. 3-1448]

The committee commented that many trading areas were not producing the volume of Sealy business that could reasonably be expected, and that the Board should find ways to correct this condition and bring all territories up to the reasonable par; in many instances, for example, the committee said that territories were entirely too far from the sources of supply, so that additional factories or warehouses should be established to serve those areas. [GX 77(642, 979), pp. 3-1446-51, R. 517]

46. In February 1956, a bulletin to the licensees asked for volunteers to serve on the Specification and Cost Committees. With regard to the Specification Committee, the bulletin indicated that a considerable amount of work would be involved because the specifications for the resale line were in need of a complete review and overhaul; the committee would also give attention to other bedding specifications required in Sealy's national work. [GX 777, R. 1771]

47. The type of functions performed by the Advertising & Merchandising Committee is shown in the minutes of the [fol. 166] committee meetings in December 1956 and January 1957. For example, the subjects considered at the December 1956 meeting included: Cleveland's merchandising plan for Anniversary Con.sealy.beds; the Spring Posturepedic program; the 1957-1958 advertising budget; a retail salesman's incentive program for 1957; the January Market; a Posturepedic acetate folder; the semi-annual promotion, the Golden Sleep—1957; plans for a 1957 Holiday Special promotion; review of old TV film commercials; the question of Sealy paying for the preparation of ten-second television commercials; and the scheduling of another meeting to finalize plans for Spring Posturepedic and develop the program for the 1957 Golden Sleep promotion. [GX 632, p. 3-6200-05, R. 1576] At the meeting in January 1957, the Advertising & Merchandising Committee discussed principally the specific elements of the forthcoming promotions, the Spring Posturepedic and the Golden Sleep, including national magazine ads, window displays, sales portfolios, and similar promotional materials. [GX 664, p. 3-6212-17, R. 1593]

[fol. 167] B. Development of Sealy Staff.

48. At a meeting in November 1933, the Executive Committee agreed that it would be necessary to secure the services of some outstanding man in the mattress industry who would devote his time exclusively to Sealy—in other words, a full-time, professional executive, not associated with any of the licensees. [GX 9, p. 3-7236, R. 174]

49. At the Sealy meeting in August 1936, a number of advertising agencies made presentations for a Sealy advertising and promotion campaign, and one of them was selected "to handle Sealy advertising under the supervision of a Sealy advertising committee." A Mr. Henderson, identified as the advertising manager of the B. F. Goodrich Co., discussed joint and cooperative advertising between Sealy and Goodrich, which company was manufacturing the Nukraft pad component for certain Sealy mattresses; Mr. Henderson indicated that he would be willing to act in an advisory capacity to the Sealy Advertising Committee. [GX 33(931), pp. 3-6685-87, R. 290]

50. At this same meeting in August 1936, H. E. Wolf, Sealy president, introduced Brody and Englehardt, who were interested in undertaking contact and general promotional work for Sealy. After they discussed their qualifications [fol. 168] and the question of remuneration, they left the meeting, and the licensees discussed the relative merits of various persons who were being considered for this job. A motion was made and passed that the selection be left to president Wolf and E. H. Bergmann, a representative of the Cleveland licensee and secretary of Sealy. [GX 33(931), pp. 3-6687-88, R. 290]

51. At an Executive Committee meeting in October 1936, there was a discussion of employment by Sealy of Brody and Englehardt, who would receive salary plus percentage of royalties paid by licensees, out of which they would pay the general administrative expenses of Sealy, including space in the Chicago Furniture Mart and the salary of a trained production man. Their remittance did not include advertising or advertising agency expenses. [GX 34, pp. 3-6697-98, R. 297].

52. The contract between Sealy and Brody and Englehardt was approved at an Executive Committee meeting in December 1936. Among other things, it provided that Brody and Englehardt would do the following: Consult with Sealy's advertising agency regarding preparation of effective advertising and sales promotion material; plan a [fol. 169] program of organization for the purpose of securing additional licensees; contact manufacturers who were potential licensees and try to persuade them to sign a license contract with Sealy; conduct an educational program as to the merits of Sealy products among the personnel of Sealy licensees and of Sealy retail dealers. [GX 932, pp. 3-6700, 6726, R. 2056]

53. At an Executive Committee meeting in January 1937, the secretary read suggested committee appointments, which were approved as read. The following committees were appointed: Advertising Advisory, Engineering, Styling, Merchandising, Cost and Accounting Practices, and Purchasing. [GX 933, p. 3-6760-61, R. 2081]

54. At the Board of Directors meeting in January 1937, president Wolf outlined the proposed committee set-ups recommended by the Executive Committee, and a motion

was made and approved that "the selection of committees be left entirely in the hands of the President." [GX 934, p. 3-6762, R. 2083]

55. In November 1939, Sealy took permanent space in the American Furniture Mart in Chicago and moved its offices from Pittsburgh to Chicago. Brody was elected executive vice president of Sealy and was empowered to hire office [fol. 170] assistants. [GX 45(613), pp. 3-3199-3200, R. 361]

56. In a "president's report" dated December 1939, H. E. Wolf made the following statements with respect to the use of committees to enhance the effectiveness of Sealy, Inc. and with respect to Brody's activities:

"In order to assure all Sealy group members taking an active part in Sealy affairs, various Sealy committees were set up so that everyone could do his bit in some field, such as advertising, purchasing, etc. While some of these committees have not functioned as effectively as they might, the writer is sincerely hopeful that new appointments in this line will result in the closest possible co-operation among Sealy group members.

All of you are thoroughly acquainted with our various sales promotional effort during the past few years, and Mr. John M. Brody, Jr.'s work in this connection, and for this reason I am not going into detail about this matter." [GX 46(945), pp. 3-3223-24, R. 363]

57. Following World War II, at a Board of Directors meeting in 1945, J. R. Haas, then president of Sealy, "stated that he was in favor of training a man that might eventually become the head of Sealy, Incorporated." He had a man in mind and sought approval to hire him, but no vote was taken on the subject. [GX 956, p. 3-2050, R. 2155; see GX 957, p. 3-2058, R. 2157, in which J. R. Haas spoke at a licensee meeting "on the necessity for proper management and the need for additional top personnel."]

[fol. 171] 58. At the Board of Directors meeting in November 1950, Bergmann appointed the following standing committees: Advertising, Syndicate Selling, Grievance, and Merchandising and New Ideas. [GX 970, p. 3-1870, R. 2195] The make-up of the standing committees was somewhat different when Bergmann nominated them at the Board of

Directors meeting in November 1951: Advertising, Specifications, Promotional Sales, New Ideas and Grievance. The Advertising Committee included, in addition to four licensees, the "Entire Staff" of Sealy. [GX 974, p. 3-1613, R. 2203] In what appears to be excerpts from an agenda for the Board meeting scheduled for April 1954, the 1954 committees are listed as follows: Advertising, Merchandising, Licensee Guidance & Advisory, Production & Cost, Promotional Sales, Specifications, (each committee listed above had as members one or more persons from the Sealy staff), Grievance, Markets, New Sale Ideas, Planning & Expansion, Sales Managers and Upholstery. [GX 1005, p. 3-5366, R. 2318] The 1954 committee list was given to the Directors along with an outline of the functional responsibilities of each committee; the outline of responsibilities is not in evidence. [GX 638, p. 3-1508, R. 1491] The committees were not a great deal different, in [fol. 172] 1957; five of the seven committees included at least two members of the Sealy staff. [GX 991E, p. 3-23, R. 2275]*

59. At the meeting of the Board of Directors in April 1955, the Planning and Expansion Committee filed its report, which included the suggestion that all officers should be on the Sealy staff, as employees of Sealy, Inc. It also recommended that the president have his headquarters in Sealy's national office in Chicago. It recommended the addition to the Sealy staff of various sales and promotion members, as well as a Director of Sealy's Upholstery Division. After the report was submitted, a motion was made and passed that in the future all officers of Sealy were to be members of the Sealy staff. [GX 77 (642, 979), pp. 3-1437-38, 1446-56, R. 517]

*Defendant's answer to plaintiff's Interrogatory 58 describes the activities and personnel of certain Sealy committees between 1957 and 1960 where, again, it is evident that members of the Sealy staff were active on these committees; several were chairmen of committees at least part of the time described. [GX 1113, Interrogatories 58, 62, pp. 58-1-58-8, 62-1-62-2, R. 2372]

[fol. 173] 60. A list of employees of Sealy, Inc., from 1951 to the date of the list, shows that Sealy had a staff of twenty-three professional, technical and clerical persons in February 1957. [GX 991F, R. 2276]

C. Ownership and Licensing of Trademarks.

61. In keeping with its purpose to own and license trademarks, copyrights, trade names, labels, and brands, Sealy was continually interested in new names for its products. At the Executive Committee meeting in December 1936, plans were made for an immediate trademark search covering the ten standard Sealy names and for copyrighted the ten labels as soon as they became available. [GX 932, p. 3-6745, R. 2056]

62. At the Executive Committee meeting in January 1937, it was decided to trademark the name "Little Darling" for crib mattresses if it had not already been trademarked. [GX 933, p. 3-6760, R. 2081]

63. In November 1942, Mr. J. R. Haas was able to speak to the licensees about the progress of Sealy in its merchandising and in establishing and maintaining trademarks, all of which made possible an augmented advertising program for 1943. He also discussed the purchasing of cotton for the Sealy Tuftless mattress. [GX 950, p. 3-1952, R. 2141]

[fol. 174] 64. In 1956 a trademark search was made for Sealy's patent counsel on the trademark "Posture Perfect," and twenty-one references to similar terms used by other companies were found, mostly registered for use in Class 32, for mattresses. [GX 986, p. 3-1304-09, R. 2272]

65. GX 987 is a collection of Sealy trademarks registered between August 1918 and April 1956, inclusive. Thirty-three registered trademarks are included. The cover sheet indicates that these came from the files of Sealy's patent and trademark counsel. [GX 987, p. 3-35-67, R. 2272]

D. Stock of Sealy, Inc.

66. In 1936, E. E. Edwards left Sealy, selling his 325 shares of stock to Sealy for \$9,750, or \$30 per share; at the same time Sealy purchased 254 shares of stock held by the Southern Commercial Corporation (formerly Sealy

Mattress Co., Edwards' Texas licensee) for \$7,620. [GX 932, p. 3-6726-27, R. 2056; see GX 34, p. 3-6693, R. 297]

67. At the stockholders meeting in November 1946, the Sealy stock was put on a 6% dividend basis. [GX 55, p. 3-2090, R. 419; see GX 60(961), p. 3-1693-94, R. 440; GX 962, p. 3-1696, R. 2166]

[fol. 175] 68. The Sealy stock was distributed in such a way that each licensee did not have an equal voice with each other licensee. For example, as of March 1947, U. S. Bedding Company, Sealy's Memphis licensee, owned 344 shares of the 790 shares of Sealy stock outstanding. At the same time, Seniel Ostrow, the Los Angeles licensee, owned 60 shares, and Ernest Wuliger, the Cleveland licensee had 77 shares, so that either of them could vote with the Memphis licensee to exercise voting control of Sealy. The Memphis licensee plus any two of a number of other licensees could similarly exercise voting control of Sealy. [GX 958, R. 2159]

69. At the stockholders meeting in November 1947, the by-laws were amended to provide that no licensee could own or control more than 38% of the common stock of Sealy. [GX 962, p. 3-1697, R. 2166]

70. At the Sealy meeting in July 1948, the president stated that "approximately ninety-eight (98) shares of stock of Sealy, Incorporated was available at \$105.00 per share, it being pointed out that each licensee would be entitled to four shares." [GX 964, p. 3-1739, R. 2173]

[fol. 176] 71. At the Board of Directors meeting in November 1951, E. H. Bergmann "reported that he had requests for the purchase of common stock of Sealy, Incorporated by the following persons and corporations:" Brown Reliable Bedding Co., the Detroit licensee, 28 shares, and the president and secretary of this licensee, 50 shares each; the Chicago licensee, 50 shares; the Waterbury, Connecticut, licensee, 10 shares; and president Bergmann, 10 shares. A motion was made and passed authorizing Sealy to issue said shares at \$100 per share. [GX 972(629), p. 3-1623, R. 2198]

72. In November 1951, there were 1173 Sealy shares outstanding. The Memphis licensee still had the largest single block of stock—344 shares. At that time the Detroit

licensee and several members of the family that controlled the Detroit licensee together owned 150 shares of Sealy stock, and the Chicago licensee owned 103 shares. Thus, these two licensees plus Memphis could exercise control of Sealy. [GX 973, p. 3-1615, R. 2203]

73. At the Board of Directors meeting in November 1952, E. H. Bergmann

"stated that he had requests for additional purchases of Sealy, Incorporated stock at \$100.00 per share. The requests were as follows: 50 shares by Mrs. Bertha Hart-[fol. 177] man, 5 shares by J. R. Lawrence, 25 shares by E. H. Bergmann, 10 shares by Sidney Sutherland, 10 shares by J. Rudick, 20 shares by the Waterbury Mattress Company, 3 shares by the Empire State Bedding Company, 25 shares by M. H. Yulman, and 21 shares by the Slumber Mattress Company."

A motion was made and passed that purchase of said shares be authorized. [GX 976(70), p. 3-1576, R. 2207]

74. In the president's report to the stockholders of Sealy at the close of the fiscal year ended June 30, 1954, the following statement was made with regard to corporate organization:

"The corporation has an authorized capital of \$250,000.00 consisting of 2,500 shares of common stock, of a par value of \$100.00 per share. As of June 30, 1954, 2431 shares of this stock has been issued, of which 959 shares was classified as Treasury stock. Since June 30, 1954, all of the remaining 69 shares of unissued stock was sold. In addition, 359 shares of the 959 shares of stock classified as Treasury stock was offered to stockholders on a pre-emptive basis. All of the stock so offered was purchased except 61 shares which was divided equally on a per plant basis. There remains, as of the date of this report, only 600 shares of Treasury Stock which has not been offered for sale. The Board of Directors on September 20, 1954 passed a resolution that the remaining 600 shares of stock could only be sold on the basis of the pre-emptive rights of the then existing stockholders." [GX 1011, p. 3-5543, R. 2342]

[fol. 178] 75. By September 1956, at which time there were 1900 shares of Sealy stock outstanding, the Memphis license had changed hands, and the new licensee, Slumber Products Co., had only 53 shares, no longer enough to control with another small group of shareholders. However, at this time the Detroit licensee interests owned 474 shares, which, for example, were sufficient when combined with the Kansas City and Chicago licensee interests and E. H. Bergmann to provide effective control of Sealy. A number of other small groupings could similarly control the corporation. [GX 985, p. 3-1347, R. 2238]

76. Sealy's accounting statement for the year ended June 30, 1956, shows 1900 shares of stock issued and outstanding, and capital and surplus of \$669,495. This means that the Sealy stock had increased in book value to approximately \$352 per share. [GX 996, p. 3-2765, R. 2291]

77. At the meeting of the Board of Directors in November 1956, the Board was apprised of E. M. Wulinger's offer of \$4,000 to Sidney Sutherland for the Sealy stock owned by him. (GX 985 shows 21 shares owned by Sidney Sutherland as of September 26, 1956.) On motion made and passed, it was resolved that:

"the executive office be instructed to ascertain whether or [fol. 179] not it would have any effect on the value of the stock if E. M. Wuliger purchased it, or if the corporation purchased it, and, assuming no change would result, and all things being equal, that E. M. Wuliger be allowed to purchase the stock rather than the corporation." [GX 984(82), p. 3-1351, R. 2232]

E. Royalties by Licensees.

78. The earliest method by which Sealy obtained royalty income from its licensees was through the sale of the Sealy labels that were required to be affixed to all Sealy products. The price of the labels was determined by the values assigned for that purpose by Sealy to the various Sealy products to which the labels would be affixed. The license contract provided certain minimum considerations payable to Sealy each month in the event that the prescribed minimum amount was not paid to Sealy through the purchase of labels. [See, e.g., GX 1016, pp. 3-3410-14, R. 2354.]

79. At an Executive Committee meeting in December 1936, in a discussion of the possibility of the Memphis licensee relinquishing certain territories, E. H. Bergmann stated that:

"the only basis on which the territorial situations could be worked out, in all fairness to Sealy, Incorporated, was to set up a fair royalty return from each territory, either [fol. 180] by warehouse or direct contact, live up to the expected returns or else yield the said territory to Sealy, Incorporated for licensing." [GX 932, p. 3-6700, R. 2056]

80. Sealy's profit and loss statement for the period January 1, 1937 through November 30, 1939, shows royalties in the amount of \$54,247.02. Sealy's profit and loss statement for the period July 1, 1937 to December 1, 1937, shows royalties in the amount of \$25,659.60. [GX 940, pp. 3-6881-82, R. 2103]

81. Sealy maintained control over the amount of royalty payments it collected from its licensees. At the Board of Directors meeting in March 1945, Herbert J. Haas, Sealy's attorney, reported on the preparation of new license contracts, and a motion was made and seconded that:

"the contracts might provide for the grant of permanent license to Licensees when authorized by the Board of Directors after a study of the record of the respective Licensee, but the permanent contracts should contain a provision that upon 90 days' notice from Sealy, Incorporated shall have the right to increase or decrease royalty payments, raise or lower minimums, and make such other changes in the contracts as Sealy, Incorporated shall deem necessary or expedient except that the territory provided in the license shall not be changed, and that no permanent license can be granted except by a vote of three-fourths of the Board of Directors." [GX 53, pp. 3-2020-21, R. 405]

[fol. 181] 82. The royalty payment was later changed to 3% of the licensee's gross sales up to a certain amount, then 2%, and then 1% as various sales plateaus were reached; the minimum monthly payment was retained as

part of the royalty provision. The 3% royalty provision was in Sealy's standard contracts by 1950. [GX 1061, p. 3-2350-51, R. 2358; see also GX 58(960), p. 3-1682, R. 428; GX 59, p. 3-1685, R. 437; GX 60(961), p. 3-1694-95, R. 440; GX 61, p. 3-1706, R. 447; GX 62(619, 963), p. 3-1715, R. 450; see, e.g., GX 1063, pp. 3-2374-75, R. 2358; GX 1064, pp. 3-2390-93, R. 2358; GX 1065, pp. 3-3409-13, R. 2360]

83. Sealy's gross royalty income for the years ending June 30, 1953 through 1956, appears in the records as follows: 1953—\$766,501; 1954—\$803,861; 1955—\$977,721; 1956—\$1,167,052. [GX 999A, p. 3-2800, R. 2299; GX 999, p. 3-2790, R. 2298; GX 998, p. 3-2780, R. 2295; GX 996, p. 3-2766, R. 2291]

IV. Evidence Specifically Negating The Territorial Conspiracy Allegations of the Complaint

84. The preceding findings indicate the type of evidence in this record that demonstrates that there has never been a central conspiratorial purpose on the part of Sealy and its licensees to divide the United States into territories in [fol. 182] which competitors would not compete. Their main purpose has been the proper exploitation of the Sealy name and trademarks by licensing bedding manufacturers to manufacture and sell Sealy products in exchange for royalties to Sealy. The fact remains that each licensee was restricted in the territory in which he could manufacture and sell Sealy products. However, the record shows that this restriction was imposed by Sealy and was also secondary, or ancillary, to the main purpose of Sealy's license contracts. The following findings are based upon the evidence specifically related to the territorial restrictions. They show, mostly by representative examples rather than a summary of all the evidence, that: The Sealy executive committee rejected a specific proposal to divide the country among Sealy licensees; Sealy continually sought new licensees to fill in uncovered territory; and licensees relinquished territory that was not within their natural trading areas, so that it would be covered by other licensees, existing or new. These facts are incompatible with a finding that the Sealy licensees conspired to allocate territories among themselves.

85. An excellent example of the manner in which Sealy acted in its allocation of territories to licensees and in its continuing relationship with licensees is provided by plain-[fol. 183] tiff's evidence with respect to several states in the Southeastern part of the United States, namely, North and South Carolina.

[GX 33(931), p. 6679, R. 290; GX 34, p. 3-6698, R. 297; GX 932, p. 3-6700, R. 2056; GX 941, p. 3-6903, R. 2109; GX 942 (40, 605), p. 3-6907, R. 2113; GX 42 (610), pp. 3-3132, 3140, R. 345; GX 52, p. 3-1955-56, R. 398; GX 156, R. 600; GX 157, R. 601; GX 158, R. 602; GX 956, p. 3-2050, R. 2155; GX 159, R. 602; GX 59, p. 3-1685, R. 437; GX 60 (961), p. 3-1693, R. 440; GX 61, p. 3-1709, R. 447; GX 160, R. 608; GX 161, R. 609; GX 62 (619, 963), p. 3-1714, R. 450; GX 184, R. 662; GX 63, p. 3-1746, R. 454; GX 189, R. 673; GX 190, R. 675; GX 191, R. 677; GX 192, R. 679; GX 193, R. 681; GX 194, R. 683; GX 195, R. 687; GX 196, R. 689; GX 220, R. 747; GX 208, R. 718; GX 209, R. 721; GX 197, R. 694; GX 198, R. 696; GX 221, R. 750; GX 214, R. 733; GX 219, R. 736; GX 217, R. 742; GX 216, R. 739; GX 218, R. 744; GX 226, R. 763; GX 227, R. 766; GX 222, R. 753; GX 64, pp. 3-1818-19, R. 457; GX 228, R. 768; GX 229, R. 769; GX 211, R. 729; GX 224, R. 757; GX 225, R. 760; GX 199, R. 699; GX 200, R. 701; GX 201, R. 702; GX 624, pp. 3-1851-52, R. 1455; GX 625(67), p. 3-1853, R. 1457; GX 632, p. 3-1585, R. 1477; GX 304, R. 898; GX 307, R. 903; GX 308, R. 906; GX 311, R. 910; GX 295-GX 316, GX 70 (976), R. 495, R. 868-917; GX 80, p. 3-1400, R. 534; GX 389, R. 1042; GX 390, R. 1046; GX 391, R. 1047; GX 392, R. 1049; GX 393, R. 1045; GX 394, R. 1055;]

and Georgia and Florida;

GX 941, p. 3-6903, R. 2109; GX 942 (40, 605), p. 3-6907, R. 2113; GX 52, p. 3-1955, R. 398; GX 62 (619, 963), p. 3-1714, R. 450; GX 59, p. 3-1685, R. 437; GX 228, R. 768; GX 229, R. 769; GX 65, p. 3-1839, R. 464; GX 66, p. 3-1849, R. 474; GX 624, p. 3-1851, R. 1455; GX 300, R. 884; GX 300A, R. 887; GX 70 (976), p. 3-1575, R. 495; GX 337, R. 948; GX 339, R. 955; GX 342, R. 959; GX 343,

R. 960; GX 344, R. 960; GX 1008, p. 3-5461, R. 2324; [fol. 184] GX 386, R. 1039; GX 387, R. 1039; GX 81 (983), p. 3-1367, R. 537; GX 388, R. 1040; GX 382, R. 1026; GX 82(984), pp. 3-1350-51, R. 541; GX 1107, R. 2381; GX 1115, R. 2379.

It clearly portrays Sealy's attempt to exploit its name and trademarks to the fullest possible extent by assigning territory to whatever bedding manufacturer is available which can do the best job for Sealy, whether such manufacturer is an existing licensee located near the open territory or a potential new licensee. In attempting to thoroughly cover the Southeastern states with Sealy distribution, Sealy obtained territory from old licensees, found new licensees, shifted territory among licensees, discontinued its contracts with some licensees, and finally found a satisfactory licensee for the Carolinas at Lexington, N. C., but never did, insofar as the record shows, settle on a suitable licensee for Georgia and Florida. This series of events negatives the contention that Sealy is a front for competitors who created it and use it to divide the United States among themselves to avoid competition.

A. Rejection of Proposal to Divide United States Among Existing Licensees.

86. At the reorganization meeting of the Sealy Executive Committee in July 1933, H. E. Wolf proposed that the eight Sealy licensees then in existence divide the entire United [fol. 185] States between them. According to the minutes, this was seriously considered and discussed at length, but rejected. The "vital thing in which each was more concerned was the raising of a large national advertising fund immediately." It was "unanimously agreed that a large number of new factories be brought into the Sealy Corporation." [GX 8(20), p. 3-7228, R. 173]. From that time forward, and up to the latest times covered by plaintiff's evidence, the record shows that Sealy continued to seek new licensees to fill in parts of the country not adequately served by existing licensees. It is obvious that an essential inducement to prospective licensees—to get them to under-

take the obligations of a Sealy license—was the grant of exclusive rights in the territories in which Sealy asked them to manufacture, distribute, and pay royalties.

B. Sealy, Not Licensees, Granted Territories, Pursuant to Contract.

87. On February 15, 1960, J. R. Lawrence, of Sealy, wrote to the Cincinnati licensee about an agreement between the Cincinnati and Memphis licensees whereby Cincinnati took over, on a temporary trial basis, a portion of the Kentucky counties previously served by Memphis. Lawrence made it clear to the Cincinnati licensee that "the [fol. 186] franchising of territories is an exclusive right that is the property of Sealy, Incorporated," and a licensee could not relicense territory to another plant. Lawrence further stated that the Memphis licensee had released the territory in question to Sealy, which had begun negotiations with a prospective Kentucky licensee, so that the most that could be done by the Cincinnati licensee would be to serve the territory on a temporary basis. [GX 234, R. 781; see GX 232, R. 777; GX 233, R. 778]

88. With regard to confusion that arose between the Denver and California licensees as to the state of Nevada, it developed that the state was included in both licensees' contracts with Sealy. On February 16, 1950, J. R. Lawrence, of Sealy, wrote to Herbert Haas, Sealy's attorney, and stated that Earl Bergmann was going to write to the Denver licensee and advise it that if the state of Nevada was listed in its new contract, then, obviously, "it was an error as we cannot franchise territory we do not possess." [GX 176, R. 646]

C. Release of Unused Territory for New Licensees and Temporary Service of Such Territory.

89. At the Sealy meeting in August 1936, there was a recommendation that Sealy licensees release territories [fol. 187] available for new licensee prospects to provide for nationwide expansion, and that licensees no longer be permitted to subcontract portions of their territories. The reasons given were that this would assure additional revenue for Sealy, more equitably distribute the advertising

burden and provide proper distribution to take advantage of nation advertising. The reallotment of territories should be made, it was said, "either on the basis of population, or, to follow the natural, or normal, trading area surrounding a particular manufacturer in a particular locality." [GX 33(931), p. 6677, R. 290] A motion was made and passed that the licensees

"relinquish and release to Sealy, Incorporated territories other than those making up their normal trading area, that is, territories now being worked advantageously by the respective Sealy factories, and that Sealy, Incorporated be given the power to contract with manufacturers in these territories directly, thus eliminating the sub-manufacturer's contract forming a part of the present plan." [GX 33(931) p. 3-6679, R. 290]

Pursuant to the motion, various licensees in attendance expressed their willingness to release parts of their existing territories to Sealy. [GX 33(931), pp. 3-6677-80, R. 290]

90. At the Board meeting in June 1937, representatives of the B. F. Goodrich Company stated that they had experienced considerable difficulty in having Sealy mentioned [fol. 188] frequently in Goodrich advertising "because Sealy does not have proper national distribution." [GX 937(597,608), p. 3-6786, R. 2088; see GX 33(931), p. 3-6690, R. 290]

91. At the Executive Committee meeting in August 1937, E. H. Bergmann moved, and the motion was approved "that definite sales quotas be set up for the various Sealy territories, with the understanding that any plant failing to live up to its quota should be charged with that quota or forced to release the territory." These quotas were to be based upon "proper trading areas," and also on buying power per family or per capita within each territory. [GX 35(599), p. 3-6824, R. 310]

92. At an Executive Committee meeting in April 1938, president Wolf "outlined the territorial sacrifices made by various Sealy plants for the benefit of the Corporation." At this meeting the Memphis licensee ceded additional territory to Sealy. A motion was made and passed that: "All territory, once ceded to the Corporation, is to be considered Corporation property, and that any such territory which

becomes open due to a member leaving the group, or for some equally good reason, is to revert to the Corporation." [fol. 189] The original owners of such territories were to receive "special permission by the Corporation" to serve such territories until such time as new licensees were appointed, "in order to keep the Sealy name alive" in otherwise open areas. The original owners would "be consulted when a new licensee is brought in and the territory realigned on the basis of the geographical position of the new licensee." [GX 40(605, 947), pp. 3-6906-08, R. 329; see GX 46(945), p. 3-3224, R. 363]

93. At an Executive Committee meeting in April 1940, it was decided that temporary licenses by Sealy to existing Sealy manufacturers for warehouse activities in open territories were granted upon the premise that such manufacturers would "fully service and fully advertise the name of Sealy in said territories or otherwise withdraw from the area." At this meeting, the Memphis licensee was authorized to temporarily service certain Indiana territories, and the Pittsburgh licensee, the Philadelphia territory, out of Indianapolis and Philadelphia warehouses, "until such time as more suitable factory connections can be made for Sealy." [GX 48(616), p. 3-1886-97, R. 370]

[fol. 190] 94. Between November 1949 and February 1950, Sealy corresponded with its Memphis and Cincinnati licensees with respect to certain territory the Memphis licensee was willing to surrender for coverage by the Cincinnati licensee and a proposed new Louisville licensee. In response to a question from Sealy as to the counties it anticipated continuing to work in Kentucky, the Memphis licensee wrote that "we will be willing to surrender everything in Kentucky other than the counties as indicated on this list and the town of Evansville, Indiana." [GX 230, R. 772-73; GX 231, R. 774; GX 232, R. 777; GX 233, R. 778; GX 234, R. 781] On February 22, 1951, the Memphis licensee wrote to Sealy, confirming the fact that it had surrendered Evansville, Indiana, to the Louisville plant. [GX 278, R. 839]

D. Procurement of New Licensees.

95. In his "president's report," dated December 1939, H. E. Wolf, speaking about expansion, said that since his

presidency, Sealy "has had the privilege of welcoming such members as the Barcalo Manufacturing Company, the Marquardt Company, the Fred G. Hedges Bedding Company, the Ingraham Manufacturing Company, and Osiason, Incorporated." [GX 46(945), p. 3-3224, R. 363]

96. At an Executive Committee meeting in July 1941, J. R. Haas discussed the procurement of new licensees, citing six new plants that would form a nucleus for ten plants contemplated to serve the northeastern Atlantic Seaboard area. He outlined the territory to be covered by four of the new licensees "as allotted by executive committee." [GX 51, p. 3-1914, R. 394]

97. On October 7, 1942, Brody wrote to J. R. Haas, then president of Sealy, to say that he had made a careful survey and sales analysis of all territories then open in the United States and Canada. He reviewed the open territory and outlined an expansion program and proposed a calendar for immediate and future Sealy development work. Brody stated the basis for a proposed new licensing of territories as follows:

"Based upon population, buying power, trading areas and freight rates, I have divided this open territory into areas each of which is suitable for the operation of an additional Sealy plant." [GX 110, p. 3-5017, R. 563]

[fol. 192] 98. During the years that followed, Sealy was constantly working to secure national distribution of Sealy products and the most effective coverage of all parts of the United States. Sometimes this would involve adding new licensees, while at other times, it meant that Sealy would re-allocate unused or released territory to existing licensees. For example, at the Executive Committee meeting in February 1943, the committee discussed new contracts for Richmond, Cincinnati, Bluefield and Atlanta, the possibility of expansion by the addition of plants in the Carolinas, New England, Upper New York State, Detroit and St. Paul, and the possibility of the Kansas City licensee relinquishing certain counties to the Des Moines licensee. [GX 52, pp. 3-1955-56, R. 398]

99. In May 1944, president Haas wrote to Brody asking for a list of the counties that go to the Buffalo territory, so that Haas could let the Pittsburgh licensee know what

[fol. 193] Haas (Sealy) was willing to do. [GX 148, R. 586] Haas repeated his request a week later and also asked for "a breakdown of all unsold territory" to have on file in Memphis. [GX 149, R. 586] On May 17, 1944, Brody sent Haas a list of counties in the Buffalo territory as it was "assigned by Sealy originally to the Otis Buffalo Company of Buffalo, New York when they were under contract to Sealy." [GX 150, R. 586] On May 23, 1944, Brody sent Haas a "recapitulation of every open Sealy territory," including the following: Philadelphia territory; proposed Charlotte, N. C., territory; eastern New York State Sealy territory; proposed Oklahoma territory; Minneapolis, St. Paul territory; proposed Mexico territory; and four Canadian territories by Provinces instead of Counties. [GX 151, R. 587]

100. In a meeting in July 1947, the Board of Directors approved a contract with the U. S. Bedding Co., the Memphis licensee, for the Dallas, Texas, and Oklahoma territory. The Board also decided that the state of Arizona and the area around El Paso, Texas, should be combined as a separate territory. The Board also discussed an application for the Minneapolis territory and the fact that the Kansas City licensee had sold its bedding business to a new company, for which a contract was being prepared. [GX 58(960), pp. 3-1679-82, R. 428]

[fol. 194] 101. On September 21, 1948, J. R. Lawrence, of Sealy, wrote to Ross S. Rosenberg, Sanitary Bedding Co., St. Paul, Minnesota, advising him that the executive committee of Sealy had accepted his application for a franchise in the Minneapolis territory, and that his contract would start January 1, 1949, on a straight royalty basis. Lawrence outlined the territory allocated "under this franchise," calling attention to those counties around the borders of the territory, in states mostly within the territory, but which counties were already franchised to other Sealy licensees and were, therefore, excluded from this territory. [GX 186, R. 666]

102. On August 1, 1950, the Portland licensee wrote to Sealy, stating that it had been developing trade in the Alaskan Territory for several years since advised that it could do so by J. R. Haas; the licensee asked that this territory be added to its contract because "we are expend-

ing funds and efforts to develop the business in that territory." [GX 246, R. 806] On August 21, 1950, E. H. Bergmann responded to the Portland licensee and said that with Alaska seeking statehood, some day "it may, within itself, be able to support a full licenseship, possibly not without a plant but the status of a licenseehip on the part of who [fol. 195] ever may be handling it for Sealy." Bergmann said that the way to handle Alaska was to give the Portland licensee a separate contract for Alaska with a low minimum royalty for the first three years, and then determine the value of the territory when the contract comes up for renewal. [GX 247, R. 806; see GX 248, R. 807]

103. On January 16, 1951, the Richmond licensee wrote to J. R. Lawrence, acknowledging notice that the Maryland Bedding Company, Baltimore, Maryland, had taken on the Sealy franchise as of January 1, 1951. The Richmond licensee said:

"Frankly, I am pleased that you have a licensee in Washington and Baltimore and I hope that they will do a good advertising business in this area. If so, they will eventually be helpful to the Richmond factory." [GX 266, R. 818]

104. At a meeting of the Board of Directors in March 1951, E. H. Bergmann introduced Irving Fisher of the Fisher Products Company, Chester, Pennsylvania, and stated that Fisher was seeking a license agreement in the Philadelphia area. J. R. Lawrence outlined "his negotiations with Mr. Fisher and a report of his trip to Chester, Pennsylvania. Mr. Fisher gave an outline of his intended handling of the Sealy franchise in that area and after [fol. 196] answering questions of the Board members was excused from the meeting." A motion was made and passed that the Fisher Company be granted a contract for the Philadelphia area, "details in regard to territory arrangements, etc., be worked out by Sealy officials." [GX 69, pp. 3-1644-45, R. 490]

105. On March 27, 1951, E. H. Bergmann wrote to T. C. Engelhardt, the Reading, Pennsylvania, licensee, as follows:

"We have a licensee interested in taking on the Philadelphia territory and in order to round out a territory for him that will fit into his present operations it is

going to be necessary for us to give him the county in New Jersey which embraces the City of Trenton from the present Passaic contract.

"In order that we may tie into this county correctly and give him a straight run to Trenton I want to include in his territory two counties which have been serviced by the Reading plant during the past. These two counties are Montgomery and Buck.

"I am pleased to have you tell me that you felt that it would be possible for this change in the territory to be worked out with Philadelphia and I would appreciate having you write me and advise me that you have no objection to the placing of these two counties in the new proposed Philadelphia licenseehip." [GX 279, R. 840]

E. H. Bergmann wrote to the Reading licensee again on April 13, 1951, repeating that:

[fol. 197] "What I want to do is to give the entire Montgomery and Buck counties to Philadelphia so as to round out their territory and I wish you would govern yourself accordingly. I am quite sure that these few little towns will not make too much difference to you and it is going to make a tremendous difference to me and to Philadelphia to get them started with a full complement of territory." [GX 280, R. 842]

Sealy assigned certain additional counties to the Reading licensee, and on May 23, 1951, Bergmann wrote to Engelhardt, saying that he was happy to include these counties as part of the Reading territory, and Bergmann thought that they would "more than justify the exclusion of the few cities that you have covered in Montgomery and Bucks Counties." [GX 281, R. 844] On May 7, 1951, Bergmann wrote to the Chester licensee, stating that he was "not in a position to guarantee to you that I can amend the contract at this time to include Montgomery and Buck counties." However, Bergmann said that he had written a letter to Reading calling that licensee's attention

"to the fact that inasmuch as they have not objected to my letter to them stating that it was my desire to include these two counties in your contract that I assumed they

were willing to cooperate and that I was issuing their new contract on that basis. I have every reason to believe that Ted Engelhardt is going to be perfectly willing to go along on that basis, but I don't want to definitely promise you the contract until I have his verbal or written okay." [GX 285, R. 850]

[fol. 198] 106. On July 10, 1953, J. R. Lawrence wrote to E. H. Bergmann regarding certain counties being added to the Reading and Pittsburgh contracts. Lawrence said

"This takes care of all the open counties in Pennsylvania with the exception of Susquehanna. I believe it was your intention to have all the open counties covered by some plant, and I will appreciate it if you will let me know in whose area you would want Susquehanna. As I see the map, you have two possibilities, one the Rochester plant and the other the Reading plant." [GX 345, p. 3-5058, R. 960]

Bergmann responded on July 23, stating that Susquehanna should go in Ted Engelhardt's territory [Reading licensee]; Bergmann doubted whether the Rochester licensee would do much with that county because "it is quite a ways from their plant," and so he assigned it to the Reading territory. [GX 345, p. 3-5057, R. 960]

107. In September and October 1955, E. H. Bergmann corresponded with H. B. Fouts, the Des Moines licensee, regarding a request that Des Moines relinquish some territory to be combined with certain territory that would be relinquished by the Chicago licensee in order to work out a franchise for a Davenport company. Fouts stated that the Des Moines licensee would not consider giving up any part of its territory; he said that:

[fol. 199] "there was a time when we were not too interested in the city of Davenport itself, but times have changed, we have completely reorganized our sales force, and we have spent considerable time and money in Davenport and the adjoining territory. As a result, our business has improved greatly. That being the case, we would not for one minute even consider giving up Davenport to anyone let alone a new licensee." [GX 377, R. 1016]

Fouts raised the question why the Davenport Bedding Company was suddenly interested in a Sealy franchise; and he suggested that the reason might be that the company was seeking the advantage of the name Sealy to help it sell private brand merchandise in contiguous territories. Bergmann responded that the matter was now closed, but in answer to Fouts' question, he said that he had been "trying to contact the Davenport Bedding Company in the right way for over six months. Actually we went to them, they did not seek a Sealy licenseeship." [GX 376, R. 1015; GX 377, R. 1016; GX 378, R. 1021].

108. In a letter to the Rochester, New York, licensee, dated May 11, 1956, E. H. Bergmann wrote about a discussion that had arisen at a Board meeting relating to the recommendations of a management consulting firm "concerning the realignment of territories in order to obtain complete coverage. It was pointed out that many licensees are not exploiting all their territory, and an effort [fol. 200] should be made to have them relinquish such territory that they are not utilizing to the fullest possible extent." The Board of Directors had decided that the Sealy executive office should:

"Set up machinery to work with all licensees not presently achieving 80% of par in all major divisions of their territory in order to either (A. offer every assistance to such licensee to enable such licensee to bring about such better development,) or (B. obtain *voluntary relinquishment* of the undeveloped territory for realignment,) and (C. to make a semi-annual report to the Executive Committee of the Board disclosing the progress resulting from such efforts, and all legal steps be taken to continue and implement the program so as to bring about complete nationwide development)." [GX 383, R. 1028]

109. The position of Sealy vis-a-vis each licensee was further discussed in a letter from E. H. Bergmann to the Louisville licensee, dated June 4, 1956, relating to the possibility of certain territorial adjustments for the benefit of the Louisville licensee, which the licensee felt would also work to the advantage of Sealy. Mr. Bergmann stated that the licensee's request, which he was unable to grant, related to:

"a subject of which this office is constantly aware, namely, the refinement of territories between contiguous plants for the over-all betterment of the national picture, the specific improvement of one plant, the avoidance of any harm or penalty to the plant being asked to cooperate with the national office in facing up to the realistic facts concerning sales performances.

[fol. 201] "Unfortunately, all territories are under contract which requires voluntary acquiescence to any suggestions of refinements. This writer over a period of years has found this to be a most difficult problem. . . . We work constantly at the problem, and it is surprising how many little adjustments of a county or two are made each year because of the gentle negotiations going on at all times to improve the national position with no particular harm to any one individual operating unit." [GX 385, R. 1035; see also, GX 384, R. 1032]

E. Termination of Licenses.

110. At the Board of Directors Meeting in November 1938, a letter from the Philadelphia licensee was read. A motion was made and passed that "Sealy cooperate with the Philadelphia plant, in view of their apparent sincerity, accepting their stock in part liquidation of their account, with a minimum of \$100.00 per month subject to change upon notice by the Board with the understanding that a definite arrangement will be made by Philadelphia for paying up its arrears." At this meeting, president Wolf also informed the Board that "the St. Paul contract had been terminated, upon request of the St. Paul plant, and that this organization therefore was no longer part of the Sealy group." [GX 601, pp. 3-6957-58, R. 1391]

111. At a meeting of the Executive Committee in April 1940, a motion was made and passed that Sealy "accept [fol. 202] cancellation of the contract between Sealy, Incorporated and the Sealy Mattress Company at Philadelphia, Pennsylvania." President Haas was instructed "to effect a settlement from Philadelphia to cover obligations due Sealy." [GX 48(615), pp. 3-1877-78, R. 370]

112. At a meeting of the Executive Committee in June 1940, president Haas notified the committee that he executed on behalf of Sealy "a termination of the contract between

Sealy, Incorporated, and the Sealy Mattress Company of Tigard, Oregon, in line with the request of Mr. M. P. Cady of Tigard." All obligations of the Tigard licensee to Sealy had been settled in full. The termination was conditioned upon Sealy's acceptance as a licensee of the Pettit Feather Bedding Company of Portland, Oregon, which would absorb the Sealy Mattress Company of Tigard. At the same meeting, Haas notified the executive committee that he had executed a license contract between Sealy and Pettit. [GX 49, p. 3-1888, R. 383]

113. At the Executive Committee meeting in May 1947, the Milwaukee licensee announced that its stockholders had agreed to sell the company to the Sealy Mattress Company of Illinois, the Chicago licensee. A motion was made and passed, with M. A. Kaplan, of the Chicago licensee, not [fol. 203] voting, that Sealy consent to a transfer of the Milwaukee franchise to the Chicago licensee. [GX 57(959), pp. 3-1673-74, R. 414]

114. At the meeting of the Executive Committee in May 1947, J. R. Haas "made a report regarding his negotiations with the Kansas City and Fall River Licensees. He stated that neither of the present Licensees were doing a first class job, and had given each of them until June 1, 1947, to make a showing, and if such showing was not satisfactory to him, he thought that new licensees should be appointed." A motion was made and passed authorizing Haas to handle the question of continuing these licensees or appointing new licensees. [GX 57, p. 3-1676, R. 414]. At a meeting of the Board of Directors in July 1947, J. M. Brody, speaking on Sealy sales and prospects, "called attention to the fact that Sealy had a new Licensee at Kansas City"; Brody spoke highly of the new licensee and said that he expected that Sealy would have a very strong situation in this territory. [GX 58(960), pp. 3-1679, 1682, R. 428].

115. At a meeting of the Board of Directors in June 1950, E. H. Bergmann reported that the Charles A. Maish Company of Cincinnati "had decided not to sign the agreement tendered to them at the direction of the last meeting of the Board and that the working arrangement with the Charles [fol. 204] A. Maish Company would terminate on June 15." A motion was made and passed that the open territory

be serviced by the neighboring plants "on a temporary basis until new licensees are located for the area." [GX 66, pp. 3-1849-50, R. 474; see also GX 250, R. 812, in which Sealy states, on November 8, 1950, that the Maish Company "has closed their plant because of labor and management difficulty;" see GX 245, R. 804; GX 250-65, R. 812, 817]

116. At a meeting of the Board of Directors in September 1950, the Board approved the minutes of the Executive Committee meeting of August 1950, except that the Board further discussed the franchise of the American Bedding Company of Charlotte, North Carolina. E. H. Bergmann gave the details concerning the change in ownership of the Charlotte licensee, and J. R. Lawrence provided information regarding sales figures and performance of the licensee. A motion was made and passed that the license contract be continued with the new owners. [GX 67(625), p. 3-1853, R. 479]

117. At a meeting of the Board of Directors in September 1952, a discussion arose as to the renewal of the license contract of American Bedding Company, of Charlotte, North Carolina. W. L. Harris, of the Charlotte licensee, spoke about the accomplishments of his company under the [fol. 205] Sealy franchise, answered questions pertaining to the management and operation of the company, and requested renewal of the contract. Harris was excused from the meeting, and a motion was made and passed that the manufacturing facilities and sales effort of the licensee were deemed inadequate, and the licensee was not entitled to a renewal. As required by the license contract, this motion received a two-thirds vote. The motion contained the following introductory clause:

"from the report of the officers of Sealy, Incorporated it is apparent that the manufacturing facilities and sales effort of the American Bedding Company are insufficient to meet the requirements of Sealy, Incorporated in the territory covered by the license to the American Bedding Company, and that such manufacturing facilities and sales effort have not been improved during the license period, which began October 1, 1949, and ends September 30, 1952." [GX 632, pp. 3-1585-86, R. 1477]

118. At a meeting of the Board of Directors in November 1956, the Board was "apprised of the problems which had been encountered in connection with the Orlando plant, beginning in June, 1956, and continuing to their termination by purchase of the plant by the corporation on September 7, 1956." [GX 82(984), p. 3-1348, R. 541]

119. Plaintiff's evidence, read as a whole, conclusively [fol. 206] proves that the Sealy licensing arrangements were developed in the early 1920's for entirely legitimate business purposes, including royalty income to Sugar Land Industries, which owned the Sealy name, trademarks and patents, and the benefits to licensees of joint purchasing, research, engineering, advertising and merchandising. These objectives were carried out by successor companies, including defendant, whose activities have been directed not toward market division among licensees but toward obtaining additional licensees and more intensive sales coverage.

[fol. 207] V. Retail Price Fixing by Co-Conspirator Stockholder-Licensees with Sealy, Inc. and its Predecessor, Sealy Corporation.

120. At the sixth semi-annual general convention of the Sealy member factories in January 1925, the member factory representatives agreed upon and set the advertised retail price of two Sealy mattresses (GX 10 [alias of GX 1]; Tr. 108-124, 181; Doc. 3-7091).

121. In January and June 1927, the stockholder-licensee representatives at the semiannual conventions of Sealy, Inc. discussed and agreed to maintain the resale price on the Sealy tuftless mattresses (GX 12-13; Tr. 187-190, 193-193; Dec. 3-7150, 3-7160).

122. Acting as the Executive Committee of Sealy Corporation in November 1927, the member factory representatives agreed upon the resale price for seven Sealy products (GX 14 [alias of GX 5]; Tr. 196; Doc. 3-7054).

123. At the eleventh semi-annual convention of Sealy Corporation in January 1928, the twenty member factory representatives present decided upon the resale prices for seven Sealy products (GX 15 [alias of GX 6]; Tr. 203-204; Doc. 3-7169).

[fol. 208] 124. At the Sealy convention in January 1931, fourteen member factory representatives discussed and set the retail prices for various Sealy products (GX 17; Tr. 208-212; Doc. 3-7188, 3-7189).

125. Acting as the Executive Committee of Sealy Corporation, in December 1932, the stockholder-licensee representatives "agreed upon" and set the resale prices for eight Sealy products (GX 19; Tr. 223-225; Doc. 3-7220 to 3-7222).

126. The Executive Committee of Sealy Corporation, consisting of the stockholder-licensee representatives, in July 1933, agreed that no cut prices were to be made on any of the articles advertised in national magazines. The minutes of the meeting interpret that agreement to mean that no cut price could be made without general authorization of the group and then only on a uniform basis throughout the United States (GX 20; Tr. 226-227; Doc. 3-7227 to 3-7229).

127. All of the stockholder-licensee representatives in July 1935 were of the decided opinion that uniform names and retail prices should be adopted, and therefore agreed upon uniform names and set uniform retail prices for various Sealy products (GX 593; Tr. 1359-1361; Doc. 3-7245).

128. Acting as the directors and officers of Sealy, Inc. in June 1936, the stockholder-licensee representatives unanimously agreed that \$19.75 would be set as the lowest advertised retail price on any Sealy mattress (GX 594; Tr. 1361-1363).

[fol. 209] 129. Acting as the Executive Committee of Sealy, Inc., the stockholder-licensee representatives in March 1937 changed and placed into effect the resale prices on three Sealy products. At that meeting letters were read from the Houston and Los Angeles licensee-members requesting permission to offer Sealy innerspring mattresses at less than the minimum resale price (\$19.75) established by Sealy, Inc. The stockholder-licensee representatives agreed that the Houston and Los Angeles licensee-members should be advised that Sealy could not make any exception to the general ruling (GX 595; Tr. 1366-1369; Doc. 3-6772, 3-6775).

130. The stockholder-licensee representatives acting as the Executive Committee of Sealy, Inc. in May 1937; agreed that 125 per cent would be the maximum markup on Sealy goods in place of the 100 per cent markup previously set, this 125 per cent markup to be based on the standard wholesale price. They further agreed "that all Sealy plants be compelled to adhere to *all established Sealy prices*, unless permission to the contrary was officially granted by Sealy, Incorporated" (emphasis supplied) (GX 596; Tr. 1373-1374; Doc. 3-6777, 3-6779).

131. The Executive Committee, comprised of the stockholder-licensee representatives, in May 1937 agreed that the Texas and Kansas City licensee-members be permitted to offer the Sealy tuftless mattress at \$39.50 resale due to the conditions existent in those localities (GX 596; Tr. 1374; Doc. 3-6779).

[fol. 210] 132. Acting as the board of directors of Sealy, Inc., the stockholder-licensee representatives on July 1, 1937 agreed upon and set the minimum retail price on the Sealy tuftless mattress run singly or in combination with other items. They further agreed that the Sealy member factories should be permitted to run a special promotion during February and August if they so desired, during which the maximum markup would be increased to 160 per cent instead of the usual 125 per cent (GX 597; Tr. 1377; Doc. 3-6788, 3-6789).

133. At the meeting of the stockholder-licensees of Sealy, Inc., in July 1937, Mr. J. R. Haas, the Memphis stockholder-licensee representative and the vice president of Sealy, Inc. at that time, made the announcement that the Sealy tuftless mattress had been removed from the standard Sealy line and could be offered under a class label with the understanding that the resale price would not be less than \$39.50 (GX 598; Tr. 1379; Doc. 3-6806):

134. At the August 1937 meeting of the Executive Committee of Sealy, Inc., which committee consisted of stockholder-licensee representatives, Mr. John B. Brody made a presentation concerning the Crestline brand and a copy of his report was made a part of the minutes of the meeting. The report stated that upon the adoption by the Sealy stockholder-licensees of an off brand for merchandising by

Sealy stockholder-licensees, Messrs. Brody and Englehardt would submit their recommendations for effective handling [fol. 211] of this off brand for Executive Committee approval. Point 5 of the ten-point report is entitled "Control of Resale Prices." Under point 5, Messrs. Brody and Englehardt suggested that the control of the resale prices, as set by the stockholder-licensees of Sealy, Incorporated at the last national meeting, be established by the Executive Committee in line with the unanimous agreement of the stockholder-licensees. The control referred to is that of a limitation in markup on wholesale cost to a maximum figure of 200 per cent. This recommendation was adopted by the stockholder-licensee representatives present (GX 599; Tr. 1384-1385; Doc. 3-6810, 3-6814 to 3-6819).

135. Acting as the Executive Committee, the stockholder-licensee representatives in August 1937 agreed that the Sealy tuftless mattress would be reinstated to the standard Sealy line with the understanding that the garnetted Tuftless could be sold at \$39.50 under a class label, but the air woven Tuftless was to be sold under the standard label at \$49.50 (GX 599; Tr. 1385-1386; Doc. 3-6820).

136. The stockholder-licensee representatives, acting as the Executive Committee of Sealy, Inc. in October 1937, agreed that a new mattress should be added to the Sealy line, with practically the same specifications as the Fast Asleep, and to sell at \$19.75 resale; and that the Trueease mattress would be sold at \$24.75 retail (GX 600; Tr. 1389-1390; Doc. 3-6834, 3-6839).

[fol. 212] 137. Acting as the board of directors of Sealy, Inc., the stockholder-licensee representatives on November 12, 1937, agreed upon and set the price of the Sealy Tuftless mattress and further that the new Trueease mattress would be made to the present specifications of the present Sleep Charm with this new Sealy Trueease to retail at \$24.75 (GX 602; Tr. 1395-1397; Doc. 3-6845).

138. The official rulings of the Executive Committee of Sealy, Inc., which was comprised of the stockholder-licensee representatives, for the year 1937, record that:

- (a) A new mattress was to be added to the Sealy line with Fastasleep specifications to sell at \$19.75 resale;
- (b) The garnetted Tuftless was to retail at \$39.50, the

air woven Tuftless at \$49.50, and the Sealy Tuftless was to be reinstated to standard Sealy line at \$39.50;

and

(c) The name Sleep Joy was to be confined to the \$39.50 bracket.

These official rulings were formally approved by the stockholder-licensee representatives at the Sealy annual meeting held on December 6, 1937 (GX 603, 604; Tr. 1398-1399, 1401; Doc. 3-6852, 3-6853, 3-6857).

139. At the meeting of the board of directors of Sealy, Inc. on November 4, 1938, the president, Harry E. Wolf, who was also a representative of the Pittsburgh stockholder-licensee, questioned the stockholder-licensee representatives [fol. 213] comprising the board of directors as to their wishes with regard to the maintenance of a \$19.75 Sealy minimum price and following considerable discussion, the matter was put to a vote. The majority of the stockholder-licensee representatives favored the retention of the minimum price. Facts presented at the stockholder-licensee meeting the following day also favored the retention of the minimum price (GX 601; Tr. 1391-1392; Doc. 3-6955, 3-6956).

140. The minutes of the Sealy, Inc. Executive Committee meeting of April 26, 1938 record that stockholder-licensee representatives Louis Haas and Joe Rogers agreed to discontinue advertising the Sealy Rest at \$39.50 and to replace all floor samples of the Sealy Rest with samples of the Sealy Kraft at \$39.50 (GX 605; Tr. 1403-1404; Doc. 3-6914).

141. The stockholder-licensee representatives at the Executive Committee meeting on April 26, 1938, agreed upon and set the price for the Sealy Fastasleep and agreed upon and set the new minimum price for Sealy products at \$19.75 (GX 605; Tr. 1405; Doc. 3-6917).

142. At the meeting of the board of directors of Sealy, Inc. in June 1938, the stockholder-licensee representatives present heard the official rulings of the acting president and the Executive Committee. These rulings stated (1) the minimum Sealy price was then established at \$19.75 [fol. 214] instead of \$19.95, (2) the new resale price of the Super Sealy Rest was then established at \$49.50, (3) a slight variation was permissible in the wholesale price of

promotional Sealy products but not in the resale price, (4) it was permissible for dealers to make an allowance on promotional products, such as a \$5.00 trade-in allowance, provided the established \$19.75 minimum retail price was maintained. The stockholder-licensee representatives changed the official ruling dealing with permissible allowances to provide that an allowance was permissible with the understanding the established \$19.75 minimum retail price *must be* maintained (GX 606; Tr. 1408-1409; Doc. 3-6933, 3-6934, 3-6936).

143. The stockholder-licensee representatives, at the board of directors meeting in June 1938, decided that the New York licensee-member and any other licensee-members desiring to do so would be granted permission to sell a Posture Pillow mattress with Nukraft center at a price of \$39.50. They further agreed that the \$19.75 minimum retail price would be retained (GX 606; Tr. 1410; Doc. 3-6946, 3-6948).

144. The stockholder-licensee representatives, at the meeting of the Executive Committee of Sealy, Inc. on November 9, 1938, agreed that the stockholder-licensees should be granted permission to manufacture the Super Sealy Rest in Posture Pillow design to retail at \$49.50 (GX 607; Tr. 1412-1413; Doc. 3-6993).

[fol. 215] 145. Acting as the Executive Committee of Sealy, Inc., the stockholder-licensee representatives in November and December 1938, changed, agreed upon, and set the retail prices on various Sealy products (GX 609; Tr. 1418-1419; Doc. 3-7002, 3-7003).

146. The stockholder-licensee representatives at the meeting of the Executive Committee of Sealy, Inc. in January 1939, decided that on all future Sealy promotions a markup of 80 per cent (40 per cent on sales) must be maintained for the dealers (GX 610; Tr. 1420; Doc. 3-3138).

147. Acting as the board of directors of Sealy, Inc., the stockholder-licensee representatives in May 1939, decided that Sealy, Inc. would adopt a hair top mattress to be called "The Prize Winner" which would carry a comparative of \$29.50 and would sell at \$19.95. They further agreed upon and set a new minimum retail price on a particular Sealy mattress along with the plans for merchandising it (GX 611; Tr. 1422-1424; Doc. 3-3149 to 3-3152).

148. At the Sealy, Inc. stockholder-licensee meeting in May 1939, a change in policy with regard to Sealy's minimum resale prices was announced (GX 612; Tr. 1425-1426; Doc. 3-3167).

149. The stockholder-licensee representatives, acting as the Executive Committee of Sealy, Inc., in November 1939, decided that J. R. Haas, the Memphis stockholder-licensee, would prepare specifications for studio couches and bed divans for sale in suggested resale prices (GX 613; Tr. 1430; Doc. 3-3204).

[fol. 216] 150. The stockholder-licensee representatives, at the Sealy, Inc. Executive Committee meeting on April 26, 1940, unanimously agreed upon and set a new resale price for the Sealy Rest mattress (GX 615; Tr. 1434-1435; Doc. 3-1882).

151. The stockholder-licensee representatives, acting as the Executive Committee of Sealy, Inc. in April 1940, gave consent to the Sealy Mattress Company of Memphis to sell Sealy mattresses to Montgomery Ward & Company within its own area, provided such sales made by Montgomery Ward & Company were handled through normal retail outlets at the agreed upon and set standard Sealy retail prices (GX 616; Tr. 1436; Doc. 3-1887).

152. The stockholder-licensee representatives, at Sealy, Inc. Executive Committee meeting in February 1948, decided that two alternate names could be used by the Sealy stockholder-licensees for each of the regular resale mattresses subject to the provisions that:

- (a) In no case could a Sealy item be advertised below \$29.95;
- (b) Under no circumstances was there to be any pre-ticketing of the alternate name item by the stockholder-licensee; and
- (c) Under no circumstances was the stockholder-licensee to allow a price comparative to be used by the retail advertisers.

They further agreed upon and set the suggested national resale price for the Cotton Boll innerspring mattresses (GX 619; Tr. 1443-1444; Doc. 3-1713 to 3-1715).

[fol. 217] 153. At the meeting of the Sealy, Inc. Executive Committee in May 1949, the president, E. H. Bergmann, who

was also the general manager of the Cleveland stockholder-licensee at that time, suggested a reduction in the minimum advertised retail price of Sealy merchandise. The committee agreed that the Sealy stockholder-licensees so desiring would be permitted to allow their dealers to advertise Sealy merchandise as low as \$24.75 (GX 620; Tr. 1446-1447; Doc. 3-1805).

154. The stockholder-licensee representatives present at the Sealy, Inc. Executive Committee meeting in September 1949, adopted ticketing selections for the Sealy resale line and agreed upon and set the retail prices thereon (GX 621; Tr. 1448; Doc. 3-1817).

155. E. H. Bergmann, the president of Sealy, Inc., presented his thoughts concerning the establishment of a \$39.50 rubber topper innerspring promotion to the stockholder-licensee representatives at the Sealy, Inc. board of directors meeting in November 1949. The directors after detailed discussion decided to submit the idea to the stockholder-licensees at the annual meeting which was to be held immediately following the meeting of the board of directors (GX 622; Tr. 1451; Doc. 3-1827).

156. The stockholder-licensee representatives acting as the Executive Committee of Sealy, Inc. in December 1949, after a general discussion on the establishment of minimum [fol. 218] prices for Sealy sleep lounges, agreed upon and set the minimum resale price for Sealy sleep lounges (GX 623; Tr. 1453; Doc. 3-1832).

157. In August 1950, the stockholder-licensee representatives at a meeting of the Sealy, Inc. Executive Committee decided after some discussion that new specifications should be issued for various Sealy products. They further agreed upon and set the retail prices for various other Sealy products (GX 624; Tr. 1455-1456; Doc. 3-1851).

158. Acting as the board of directors of Sealy, Inc., the stockholder-licensee representatives in September and November 1950 discussed the resale prices of Sealy mattresses and box springs, and agreed upon and set the resale prices for nationally advertised Sealy products. They further agreed in September 1950 that the individual stockholder-licensees could decide whether or not to establish the resale prices prior to the effective date (GX 625-626; Tr. 1458-1461; Doc. 3-1856, 3-1863).

159. The stockholder-licensee representatives at the Sealy, Inc. board of directors meeting in January 1951 discussed the resale prices of Sealy items and agreed upon and set the resale price on five Sealy products (GX 627; Tr. 1461-1463; Doc. 3-1653).

160. At the meeting of the Sealy, Inc. board of directors in September 1951, there was a general discussion of the national resale prices on Sealy mattresses and box springs. After various stockholder-licensee representatives gave [fol. 219] their manufacturing costs on each item and after analyzing such costs, the stockholder-licensee representatives decided not to recommend a reduction in resale prices (GX 628; Tr. 1468-1469; Doc. 3-1629).

161. In November 1951, the stockholder-licensee representatives at the Sealy, Inc. board of directors meeting discussed the advisability of retaining the present resale price of the Sealy Posturepedic Firm-O-Rest mattress. This matter was put to a vote by the stockholder-licensee representatives acting as the board of directors. After the vote, E. H. Bergmann, the then president, stated that inasmuch as the majority of the board of directors favored the retention of the \$79.50 price it would be so ordered. At the Sealy, Inc. stockholder-licensee meeting on November 11, 1951, this decision was announced (GX 629-630; Tr. 1470, 1472; Doc. 3-1611, 3-1621).

162. The stockholder-licensee representatives acting as the Executive Committee of Sealy, Inc. in August 1952, reviewed the comparative sales figures of Posturepedic mattresses for the first half of 1951 and 1952 and decided to maintain the existing resale price of the Posturepedic mattress. They further decided to have Mr. Bergmann prepare a resolution for submission to the board of directors which would make it mandatory that all resale prices for the Posturepedic be the same at all points upon notice from Sealy (GX 631; Tr. 1474-1476; Doc. 3-1591, 3-1592).

[fol. 220] 163. The stockholder-licensee representatives at the Sealy, Inc. board of directors meeting on September 18, 1952 adopted the following resolution:

Whereas compliance by licensees on all specifications established by the board of directors is the essence of the protection afforded by the trade marks of Sealy,
Now therefore, be it resolved that the failure by any

licensees to comply with each and every item of the specifications established from time to time, including the minimum resale prices set up for the various Sealy products, shall be deemed to be harmfully and injuriously damaging to the Sealy trademarks and to the products sold thereunder.

They further discussed the advisability of changing the resale price of the children's Posturepedic mattress and agreed that no change should be made. In October 1952, the resolution passed at this meeting was disseminated to the licensee-members through the issuance of Sealy Policy Bulletin No. 12, dated October 7, 1952, which also contained the listing of the then established resale prices (GX 632, 743; Tr. 1478-1479, 1723-1725; Doc. 3-701, 3-1584, 3-1585).

164. The stockholder-licensee representatives, acting as the board of directors of Sealy, Inc. in January 1953, agreed upon and set the resale prices for various Sealy products (GX 633; Tr. 1483; Doc. 3-1556).

165. At the meeting of the board of directors of Sealy, Inc. held March 19, 1953 in Los Angeles, California, E. H. [fol. 221] Bergmann brought up the possibility of increasing the ending price of the resale brackets from 50 cents to 75 cents. The stockholder-licensee representatives present expressed their opinion and after discussion agreed that no change should be attempted (GX 634; Tr. 1484-1485; Doc. 3-1551).

166. The stockholder-licensee representatives at the Sealy, Inc. board of directors meeting in March 1953, discussed the establishment of the Baby Posturepedic resale price and decided that the Baby Posturepedic should bear a retail tag of \$19.95 without the contour sheet and \$24.75 with the contour sheet. The decision was changed in June 1953 when the stockholder-licensee representatives acting as the Sealy, Inc. board of directors, unanimously agreed that the Baby Posturepedic should be sold at \$24.75 retail, regardless of the type of plastic cover used with the mattress (GX 634-635; Tr. 1485, 1487; Doc. 3-1540, 3-1551).

167. In November 1953, the stockholder-licensee representatives, acting as the board of directors of Sealy, Inc., agreed that the five resale Con-Sealy beds as shown at the

stockholder-licensee meeting should be adopted and agreed upon and set the retail prices thereon. They further agreed upon and set the minimum advertised prices of certain of these Sealy products (GX 636; Tr. 1488-1489; Doc. 3-1530).

168. At the meeting of the Sealy, Inc. board of directors on May 10, 1954, it was called to the attention of the [fol. 222] stockholder-licensee representatives that there was a 50 cents differential in the retail price of the Posturepedic innerspring mattress and foundation set as compared to the Foam Rubber Posturepedic set. The stockholder-licensee representatives recommended, for the sake of uniformity, that the price of the Posturepedic Foam Rubber set should be the same as the Posturepedic innerspring set. They further expressed their opposition to dropping the Sealy Rest name to a \$59.50 level (GX 639; Tr. 1495; Doc. 3-1505, 3-1506).

169. The stockholder-licensee representatives at the Sealy, Inc. Executive Committee meeting on March 2, 1955, thoroughly reviewed the complete fair trade program as related to Sealy's national resale items. They decided that a definite fair trade program should be set up; that it should be submitted to the respective stockholder-licensees; and that the program would be sponsored by trade paper ads run by Sealy, Inc. They also reviewed the matter of minimum prices and agreed upon and set minimum prices for various Sealy products (GX 641; Tr. 1501-1502; Doc. 3-1458, 3-1459).

170. The stockholder-licensee representatives, acting as the Sealy, Inc. board of directors in April 1955, reviewed the prices set at the Executive Committee meeting in March 1955 and agreed on the minimum prices set by the Executive Committee with the addition that the minimum price on the Con-Sealy bed with the Posturepedic mattress should be established at \$199.50 (GX 642; Tr. 1503-1504; Doc. 3-1440).

171. The stockholder-licensee representatives, acting as the Executive Committee of Sealy, Inc. in August 1955, approved the creation of a Firm-O-Rest foam outfit to sell for \$129.50; approved the creation of a Foam Rubber Anniversary outfit with the price per set to be \$99.50; and approved an increase of \$10.00 for each of the resale Redi-

Bed and Con-Sealy beds. (GX 643; Tr. 1507-1509; Doc. 3-1419, 3-1420).

172. At the Sealy, Inc. Executive Committee meeting in June 1956, the stockholder-licensee representatives adopted the following resolution:

RESOLVED: That the general policy heretofore established by the Board of Directors, of limiting comparatives not to exceed one-third off, be abated for the 1957 Anniversary Program permitting promotion of a \$69.50 item at a sale price of \$44.50.

After a lengthy discussion as to whether or not this \$44.50 price was sound, those present agreed that the price of \$44.50 should be set (GX 646; Tr. 1516-1517; Doc. 3-1371).

173. In August 1956, the stockholder-licensee representatives, acting as the Sealy, Inc. board of directors, agreed that no price comparison should ever be used on the Posturepedic. They further agreed to maintain the existing resale [fol. 224] prices on Sealy mattresses and foundations (GX 647; Tr. 1519-1520; Doc. 3-1359, 3-1360).

174. The stockholder-licensee representatives, acting as the Executive Committee of Sealy, Inc. in January and February 1957, agreed upon and set the minimum prices on various Sealy products. They further agreed after discussion that 125 per cent of the invoiced wholesale price be the maximum markup allowed for pre-ticketed non-promotional items (GX 648; Tr. 1521; Doc. 3-1337).

175. From time to time the stockholder-licensee representatives served on the Advertising and Merchandising Committee of Sealy, Inc. and the Upholstery Committee of Sealy, Inc. These committees discussed and made recommendations as to (a) the retail prices to be set on Sealy products, (b) the minimum retail prices to be used on Sealy products, (c) the advertising and merchandising of those products, (d) the various promotions to be run on Sealy products and the retail prices to be in effect during those promotions, and (e) new products to be manufactured and promoted by the stockholder-licensees (GX 651, 653-656, 658-659, 664-665; Tr. 1532, 1539, 1542-1543, 1546-1547, 1551-1552, 1559-1562, 1564-1565, 1593, 1595-1596).

176. The minutes of the meeting of the Sales Managers Committee of Sealy, Inc. held May 3, 1956, attended by the stockholder-licensee representatives from Baltimore, Cleveland, Detroit, Des Moines, and Chicago, and two members of [fol. 225] the staff of Sealy, Inc., record (a) a suggestion that they lower the quality of their \$39.95 mattress, raise the price of their \$39.95 specifications to \$44.50, advertise both in the ad, and they did not favor the idea; (b) they felt it was absolutely necessary to raise the retail price of the 1957 anniversary promotion to \$44.50 or \$44.95; (c) a suggestion that they take a \$69.50 resale number, such as the Sealy Rest or Sleep Joy, and reduce it to \$44.50; and (d) that the reduction referred to in (c) above would have to be approved by the board of directors before such a plan could be finalized (GX 657; Tr. 1554-1556; Doc. 3-6098, 3-6099).

177. A few days prior to February 13, 1953, Sealy, Inc. issued a bulletin to all the stockholder-licensees stating that the resale prices of the Sealy resale line would move from the 50 cent bracket to the 75 cent bracket. On February 13, 1953, Sealy, Inc. issued a bulletin to all stockholder-licensees countering this previous bulletin, as the stockholder-licensee representatives comprising the board of directors had not officially approved the change. This later bulletin stated that the only change in the Sealy resale line agreed upon by the stockholder-licensee representatives on the board of directors is the change in the Sleep Charm price (GX 666; Tr. 1598; Doc. 3-3581).

[fol. 226] 178. In August 1953, the Chicago stockholder-licensee informed Sealy, Inc. that the Chicago stockholder-licensee was agreeable to selling Gamble-Skogmo Company resale goods based on Gamble-Skogmo Company's agreement to maintain the resale prices on those resale goods (GX 668; Tr. 1599-1600; Doc. 3-3577).

179. In January 1954, the Waterbury stockholder-licensee wrote Sealy, Inc. that since the Waterbury stockholder-licensee had voted for the \$199.50 minimum price on Con-Sealy beds, he was happy to receive the Sealy, Inc. bulletin stating that the resale price for the Con-Sealy beds had been set at \$199.50. He went on to ask Sealy, Inc. if it were permissible to sell the love seat size Con-Sealy bed at \$189.50, thereby maintaining his customary \$10.00

differential between the full size and the love seat size as did his competitor Simmons. E. H. Bergmann, writing for Sealy, Inc., replied that Simmons recognized the \$10.00 difference in the two sizes and he could "see no reason why we should not do the same also." Mr. Bergmann further stated that he felt the bulletins on minimum resale prices should be revised and he hoped within a short time to send a bulletin to the stockholder-licensee representatives comprising the Executive Committee and elicit their opinion as to the correct minimum prices on all items (GX 669-670; Tr. 1601-1604; Doc. 3-3526, 3-3527).

180. In February 1954, the Chicago stockholder-licensee wrote Mr. Bergmann, the president of Sealy, Inc., that he [fol. 227] had mailed a Sealy bulletin, "SP-2," to Roger Lawrence, the executive vice president of Sealy, Inc., but had requested Mr. Lawrence to delay the mailing of the bulletin to the stockholder-licensees until Mr. Bergmann could check with the Executive Committee to see if the \$199.50 price for the full size Con-Sealy bed included the Sealy Posturepedic quality mattress because the Chicago stockholder-licensee felt quite certain that it was the consensus of opinion that the Posturepedic mattress be excluded at the \$199.50 price. Mr. Bergmann replied (1) that he understood the stockholder-licensee representatives at the board of directors meeting on November 16 had agreed that the minimum price of the Con-Sealy bed was to be \$179.50 with a Posturepedic mattress; (2) that a bulletin had been issued to the stockholder-licensee as to their desires of \$179.50 or \$199.50 and that the vote had been sixteen to three in favor of the \$199.50 price; and (3) that he, Mr. Bergmann, would ask each stockholder-licensee member of the Executive Committee to write him as to his wishes and he would be governed by the majority (GX 671-672; Tr. 1605-1606; Doc. 3-3528, 3-3529).

181. In April 1954, E. H. Bergmann, president of Sealy, Inc., requested the Chicago stockholder-licensee to inform him, Bergmann, of his reaction to the difference of 50 cents (159.00 or \$159.50) in the set price between the regular innerspring and foam rubber Posturepedic sets as Bergmann had already heard from three other stockholder-licensee members of the Executive Committee as to this question (GX 675; Tr. 1612; Doc. 3-3677).

182. In March 1955, the president of Sealy, Inc., Mr. Bergmann, wrote the Cleveland stockholder-licensee that by going back through the minutes of the board of directors meetings until January 1953, he had found that the stockholder-licensee representatives comprising the board of directors had ruled that the prices of the Baby Posturepedic mattress should be \$24.95 including the plastic cover and without the cover it could be advertised at \$5.00 less, or \$19.95, and that they had further ruled that a price of \$29.95 should be established for the Youth Posturepedic mattress (GX 679; Tr. 1619-1960; Doc. 3-3576).

183. In June 1955, Sealy, Inc. issued Sealy Bulletin No. 2, revised as of June 30, 1955, to all stockholder-licensees specifying the minimum price at which Sealy merchandise could be advertised at retail. In response to this bulletin, the Baltimore and Schenectady stockholder-licensees wrote Sealy, Inc. questioning the accuracy of the price of Hollywood sets. In August 1955, Mr. Bergmann, president of Sealy, Inc., wrote to five stockholder-licensees on the board of directors asking them to indicate the changes to be made in Sealy Bulletin No. 2. Bergmann stated that upon receipt of the information the bulletin would be revised according to the opinion of the majority. The stockholder-[fol. 229] licensee in Chicago, Mr. Kaplan, replied that it was his understanding that the twin or full size sets could be *sold* at not less than \$49.50, that the minimum price was \$59.50 if the headboard was included, and that if the headboard was advertised separately, the \$49.50 minimum price was to be maintained. The stockholder-licensee in Waterbury, Mr. Walzer, replied that he believed the minimum price on a Hollywood outfit was \$59.50 (GX 685-686, 688-690; Tr. 1629-1631, 1633-1635, 1637-1638; Doc. 3-3493 to 3-3495, 3-3499, 3-3500).

184. In May 1954, Mr. Bergmann, for Sealy, Inc., wrote the Kansas City stockholder-licensee that he had had the price of the Posturepedic foam rubber set under discussion with the Executive Committee of Sealy, Inc. which consisted of six stockholder-licensee representatives and they were exactly divided fifty-fifty, as to whether it should be \$159.00 or \$159.50 per set. Bergmann further stated that he would issue further ruling based on the vote of the stock-

holder-licensee representatives meeting as the full board of directors of Sealy, Inc. on May 10 (GX 691; Tr. 1640-1641; Doc. 3-3516).

185. In August 1955, E. H. Bergmann, the president of Sealy, Inc., wrote to the stockholder-licensee representatives on the board of directors eliciting their preferences on a new resale price for the Posturepedic foam rubber mattress in an effort to arrive at a quick decision. The ten [fol. 230] stockholder-licensees so polled, responded by letter or telegram giving preferences for resale prices. Sealy, Inc. issued Bulletin No. 114 dated August 16, 1955 to all Sealy licensee-members notifying them that the pole of the directors had indicated a large majority were desirous of increasing the retail price of the Posturepedic foam rubber set to \$169.50, and requested the licensee-members to advise their dealers of the increase effective August 16, 1955 (GX 692-700, 702-704; Tr. 1641-1647, 1650-1664; Doc. 3-3481 to 3-3490, 3-3492).

186. In March 1956, the Baltimore stockholder-licensee wrote Mr. Bergmann at Sealy, Inc., that his sales of the Posturepedic foam rubber sets had decreased 70 per cent since the resale price was raised to \$169.50. The Baltimore stockholder-licensee further stated that he hoped to see Baltimore and Sealy, Inc. do something about this just as soon as possible. Mr. Bergmann, president of Sealy, Inc., replied that further action could be considered when the matter became a little more clear (GX 705-706; Tr. 1665-1668; Doc. 3-3446, 3-3447).

187. In May 1956, the Chester stockholder-licensee wrote to E. H. Bergmann at Sealy, Inc. that there should be a quick reversion to the \$159.50 resale price on the Posturepedic foam rubber mattress and that immediate remedial steps should be taken if it is deemed advisable by a majority of the licensee-members. Bergmann, for Sealy, Inc., replied that the stockholder-licensee representatives comprising the Executive Committee were unanimous in feel [fol. 231] ing that it was not necessary at that time to reduce the \$159.50 price (GX 707-708; Tr. 1669-1672; Doc. 3-3450, 3-3451).

188. In April 1955, the Rochester stockholder-licensee wrote Sealy, Inc. asking if a Sealy button free mattress

could be advertised at \$39.50. Mr. Bergmann, president of Sealy, Inc., replied that it could be advertised at that price (GX 710-711; Tr. 1674-1675; Doc. 3-3474, 3-3475).

189. E. H. Bergmann, president of Sealy, Inc., in May 1956, congratulated the Detroit stockholder-licensee for the latter's general mailing to dealers in which the Detroit stockholder-licensee had listed regulations for Sealy approved retail advertising minimums. These regulations provided as follows:

- (a) No innerspring mattress or box spring regardless of exterior finish may be advertised for less than \$29.50;
- (b) Full size or twin size Hollywood bed outfits (headboard, mattress, box spring or foundation, legs or carrying frames) may not be advertised at less than \$59.50 for the complete set;
- (c) Redi-Bed sleepers may not be advertised at less than \$159.50;
- (d) Con-Sealy bed sleepers may not be advertised at less than \$199.50;
- (e) All resale mattresses and dual sleepers, such as Con-Sealy beds, Posturepedic, Sunspun, Sealy Rest, [fol. 232] Firm-O-Rest, Good Homekeeper, and Sleep Charm, may never be advertised for less than the pre-ticketed price for any reason whatsoever;
- (f) All other promotional merchandise carrying a maximum comparative not to exceed one third off the retail price;
- (g) The word advertising as applied to the above regulations covers all display and classified linear newspaper advertising, circulars, radio, television, window and wall signs.

The Detroit stockholder-licensee further informed its dealers by a letter dated May 1, 1956 that he "will not be able to service dealers who do not conform to these retail advertising regulations" (GX 712-714; Tr. 1676-1683; Doc. 3-3471, 3-3472, 3-3652, 3-3653).

190. The Memphis stockholder-licensee in May 1956, wrote the Sealy, Inc. president, Mr. Bergmann, that he felt that "a minimum resale price of \$39.95 each on a Sealy

mattress or box spring should be adhere to" and "on ensembles the minimum price should be \$59.95" (GX 715; Tr. 1683-1684; Doc. 3-3654, 3-3655).

191. In August 1956, several stockholder-licensees wrote to Mr. Bergmann, president of Sealy, Inc., expressing their views in regard to the increase in resale prices made by Sealy's competitor Simmons, and their views as to whether Sealy, Inc. ought to raise or maintain the retail price of Sealy Posturepedic mattresses at \$79.50. A meeting of [fol. 233] the stockholder-licensee representatives comprising the Executive Committee was called and the decision was reached that the \$79.50 price of the Posturepedic mattress would be maintained. The Orlando licensee-member in October 1956 sent Sealy, Inc. a copy of its price list and a covering letter which had been mailed to its dealers. The accompanying letter dated October 15, 1956 and addressed to all Sealy dealers, stated that the Orlando licensee-member had concluded that the retail price lines could not be justifiably increased at that time and that he was maintaining the prevailing retail prices. The price list, effective October 15, 1956, specified the resale price of forty Sealy products. The prices on fourteen comparable Sealy products in this list were identical with the resale prices in the Baltimore and Richmond licensee-members' January 15, 1957 price list (GX 724, 726-730, 734-737; Tr. 1692, 1694-1698, 1702-1703, 1711-1716; Doc. 3-3467 to 3-3470, 3-3549, 3-3550).

192. In October 1956, the Schenectady member factory issued specifications for the 76th anniversary sale magazine advertising which stated that the Sealy Natural Rest would be featured and sold at a price of \$39.95. In November 1956, Sealy, Inc. sent a "Smart Living Folder" to the licensee members which included a letter signed "Sealy Mattress Companies" to the Smart Living stores containing specifications for the same sale. These specifications [fol. 234] provided that the Sealy Natural Rest mattress could not be advertised or sold for less than \$39.95. Also included in the folder was a letter signed "Sealy Mattress Companies," written by Gerald C. Shappell, to the Emerson Press submitting specifications for the mailing prices for the 76th anniversary sale, which provided that the

Sealy Natural Rest mattress and box spring would be nationally advertised for \$39.95 but could not be advertised or *sold* for less than \$39.95 (GX 731-733; Tr. 1704-1705, 1707-1709; Doc. 3-3537, 3-3544, 3-3545).

193. By stipulation at the present time, the stockholder-licensee representatives are continuing to meet as the board of directors, the Executive Committee, or other committees of Sealy, Inc. and discuss, agree upon and set

- (a) The retail prices at which Sealy products could be sold;
- (b) The retail prices at which Sealy products could be advertised;
- (c) The comparative retail prices at which the stockholder-licensees and the Sealy retailers could advertise Sealy products;
- (d) The minimum retail prices below which Sealy products could not be advertised;
- (e) The minimum retail prices below which Sealy products could not be sold; and
- (f) The means of inducing and enforcing retailers to adhere to these agreed upon and set prices.

[fol. 235] VI. Dissemination to Stockholder-Licensees of Sealy Board of Directors and Sealy Executive Committee Decisions.

194. E. H. Bergmann, president of Sealy, Inc., prepared and sent to all stockholder-licensee members Sealy Policy Bulletin No. 11, dated August 8, 1952, which informed them that the stockholder-licensee representatives constituting the board of directors had agreed that extra length bedding of 78 inches and 82 inches, on all tufted resale mattresses from \$49.50 through \$79.50, including the Posturepedic mattress, all companion box springs and foundations, were to be *sold* for the same price as the regular length of 75 inches. This bulletin was revised and reissued in April 1955 (GX 742, 758; Tr. 1721-1722, 1750; Doc. 3-703).

195. In October, 1956, Sealy, Inc., over the signature of E. H. Bergmann, issued Sealy Policy Bulletin No. 7 to the licensee-members, which informed them that no price below \$29.50 was authorized on any Sealy mattress and all trade-in sales were prohibited. This bulletin superseded previous

SP-7 bulletins of March, June, and December 1952, May 1954, and June 1955. In February 1953, Sealy, Inc. issued Revised Bulletin SP-14 to all licensee-members informing them that the stockholder-licensee representatives constituting the board of directors had changed, agreed upon and set the price of the Sleep Charm at \$39.95 (GX 770, 772, 746; Tr. 1733, 1764-1765; Doc. 3-698, 3-715, 3-716). [fol. 236] 196. In November 1954, Sealy Policy Bulletin No. 22 was issued to all licensee-members informing them of the various minimum prices at which their dealers could advertise Sealy merchandise and instructing them that all violations had to be called to the retail dealer's attention (GX 756; Tr. 1736-1737; Doc. 3-5523).

197. In January 1955, revised Sealy Policy Bulletin No. 4 was issued to all licensee-members. This bulletin stressed that if an item was pre-ticketed as to its value, the pre-ticketed price could not be reduced except upon specific directions of Sealy, Inc., nor could resale items in the national resale line be reduced in price at any time without the specific authority of Sealy, Inc. The bulletin then specified the resale price of eighteen different Sealy products in the national resale line and seven different products in the alternate resale line (GX 757; Tr. 1741-1745; Doc. 3-727, 3-728, 3-729).

198. In February 1957, Sealy, Inc. issued a revised Sealy Policy Bulletin No. 2 to all licensee-members on the subject of minimum retail prices, supplementing prior bulletins of January and February 1954, and April, May, June, and August 1955. This bulletin informed the members that the stockholder-licensee representatives acting as the board of directors had agreed upon and set the prices below which Sealy products could not be advertised or sold and the bulletin further listed the specific minimum prices for the [fol. 237] various Sealy products as approved by the stockholder-licensee representatives acting as the Executive Committee in January 1957 (GX 775; Tr. 1766-1768; Doc. 3-735, 3-736).

199. In October 1956, Sealy, Inc., over the signature of E. H. Bergmann issued Sealy Policy Bulletin No. 23 to all Sealy stockholder-licensees setting forth regulations controlling the sale of Con-Sealy beds, Redi beds, and Sealy resale beds and the minimum prices of these products. This

bulletin superseded prior SP-23 bulletins issued in November 1954 and May 1955 (GX 769; Tr. 1759-1762; Doc. 3-678, 3-681 to 3-688).

200. In June 1956, Sealy, Inc., over the signature of E. H. Bergmann, issued Bulletin No. 62 to all stockholder-licensee members informing them of the specifications for the Smart Living Stores promotion and stressing the suggested resale prices to be in effect. The bulletin also lists in excess of 118 associated stores, by name and address, in seventeen different States which were to participate in the promotion (GX 779; Tr. 1776-1777; Doc. 3-860 to 3-868).

201. In August 1956, Sealy, Inc., over the signature of E. H. Bergmann issued Bulletin No. 65 to all licensee-members informing them that the stockholder-licensee representatives serving as the Advertising and Merchandising Committee had agreed upon and set the suggested resale prices for Sealy king size sets and the prices so agreed upon and set (GX 780; Tr. 1777-1778; Doc. 3-871).

[fol. 238] 202. Sealy, Inc., over the signature of E. H. Bergmann, issued to all licensee-members Bulletin No. 67, dated August 23, 1956, on the subject of "Price Position" and solicited from the licensee-members any suggestions and observations on the subject of price which they might have had (GX 781; Tr. 1779-1780; Doc. 3-874).

203. Sealy, Inc. issued Bulletin No. 69 in August 1956, over the signature of E. H. Bergmann, on the subject of "Price Position" which informed all the licensee-members to whom it was sent that it was the unanimous opinion of the stockholder-licensee representatives comprising the board of directors that the resale prices should not be increased, and that a letter to the trade announcing the maintenance of the then present retail prices was being prepared (GX 782; Tr. 1780; Doc. 3-876).

204. Sealy, Inc. issued Bulletin No. 78 in September 1956, over the signature of E. H. Bergmann, which stated that M. A. Kaplan had been requested to compose a letter which could be sent by all licensee-members to active and prospective retail dealers regarding Sealy's decision to maintain then current resale prices. Attached to the bulletin was a copy of the letter composed by M. A. Kaplan, which Mr. Bergmann suggested should be dispatched from all

licensee-members to all active and prospective dealers. The letter addressed to all Sealy dealers stated that retail prices could not be justifiably increased at the present time, and therefore Sealy was maintaining resale prices (GX 783; Tr. 1781-1784; Doc. 3-887, 3-888).

[fol. 239] 205. In October 1956, Sealy, Inc., over the signature of E. H. Bergmann, issued Bulletins No. 79 and ADV 109, entitled "Regulatory Decisions by Board of Directors, August 28, 1956," and which stated the decision by the stockholder-licensee representatives acting as the board of directors that a price comparison of \$79.50 must never be used in promotional advertising (GX 784, 804; Tr. 1784-1785, 1800; Doc. 3-889, 3-1109).

206. From time to time Sealy, Inc. has issued specifications containing pre-ticketed resale prices and names for various Sealy products. These specifications have been approved by the stockholder-licensee representatives acting as the board of directors (GX 786-789, 791-793, 795-796; Tr. 1786-1792; Doc. 3-2900, 3-2953, 3-2965, 3-2967, 3-2969, 3-2970, 3-2979, 3-2986, 3-2991, 3-2992).

207. In September 1952, the stockholder-licensee representatives acting as the board of directors decided that the failure of any licensee to comply with every item of the specifications established from time to time, including the minimum resale prices set up for the various Sealy products, would be deemed to be harmfully and injuriously damaging to the Sealy name. This action brought the failure to comply with the minimum resale prices under the "manufacturer's contract" clause which allowed the stockholder-licensee representatives acting as the board of directors to terminate the contract with the stockholder-licensees for [fol. 240] pursuing any course of action in the selling of Sealy products which would be detrimental or injurious to Sealy (Article IV, 13 of contract, GX 1098). This decision was disseminated to the licensee-members in Sealy Policy Bulletin No. 12, dated October 7, 1952, which also stressed the resale prices then established (GX 632, 743; Tr. 1723-1725, 1478-1479; Doc. 3-701, 3-1584).

208. Sealy, Inc. issued four specifications in February 1957 for Sealy products, each bearing a specified label containing a specific name and retail price (GX 798-801; Tr. 1795-1796; Doc. 3-2924 to 3-2927).

209. In April 1956, Sealy, Inc. issued Bulletin ADV. No. 42 to all licensee-members making available to them promotional ads, mats, and specifications for four promotions and specifying suggested retail prices for six Sealy products (GX 803; Tr. 1799-1800; Doc. 3-1008 to 3-1010).

210. Sealy, Inc. in November 1956 issued its Bulletin ADV. No. 127 to all licensee-members enclosing proofs of advertising mats for Sealy's 76th anniversary sale last chance ads. Each of four mats contained the \$59.50 price effective after March 16, the 76th anniversary sale price as \$39.95, the savings of \$19.55 if the Sealy Natural Rest mattress was purchased during the sale, and a pre-ticketed price of \$59.50 after March 16 (GX 805; Tr. 1800-1802; Doc. 3-1132 to 3-1133A).

[fol. 241] 211. In December 1956, Sealy, Inc. issued its Bulletin ADV. No. 137 containing specifications and photo-stats of ads for the licensees promotional manuals. The specifications show retail prices for Sealy products. The ads show the name of the retail store and the price of \$44.95 for the 837 coil mattress (GX 806; Tr. 1803-1805; Doc. 3-1147 to 3-1151).

212. Sealy, Inc. issued a manual for the licensee meeting to be held January 14, 1956 concerning the 1956 Posturepedic campaign, which contained the agreed upon and set retail price for the Posturepedic innerspring mattress (GX 807; Tr. 1806- 1807; Doc. 3-3599 to 3-3649).

VII. Policing of and Enforcement of the Agreed Upon and Set Retail Prices by Sealy, Inc.

213. In October, 1951, E. H. Bergmann writing for Sealy, Inc., wrote to the Brooklyn licensee-member that one of his retailers had advertised a Sealy product below the permissible minimum price, and that he, Bergmann, must have written assurance from both the Brooklyn licensee-member and the retailer that such an ad would never occur again. Bergmann further stated that if the requested assurances were not received he would bring the Brooklyn licensee-member's contract before the board of trustees for cancellation. Copies of this letter also were sent to other stockholder-licensees (GX 809; Tr. 801, 1814-1815; Doc. 3-3854, 3-3854A).

214. In November 1951, J. R. Lawrence for Sealy, Inc. wrote the Memphis licensee-member concerning an ad run by a dealer in Chattanooga which offered a Sealy product at a compared price, and instructed the Memphis licensee-member to bring the matter to the attention of the proper party so there would be no repetition of such an ad in the future (GX 810; Tr. 1816-1817; Doc. 3-3905).

215. In February 1952, E. H. Bergmann for Sealy, Inc. wrote directly to a retailer in Wichita, Kansas, that one of the retailer's ads which featured a \$79.50 Sealy Posture-pedic mattress for \$39.75 had been brought to Sealy, Inc.'s attention and that such an ad was in violation of Sealy, Inc.'s rules. Bergmann further stated that all of Sealy, Inc.'s time and energy and every dollar it could spare was spent to establish the resale prices of Sealy merchandise so that dealers would not be subject to the vicissitudes of price cutting, and requested the retailer to refrain from any further price reductions on any regular pre-ticketed resale Sealy item (GX 811; Tr. 1818-1820; Doc. 3-3966).

216. E. H. Bergmann for Sealy, Inc. in February 1952 and February 1953 wrote the Los Angeles stockholder-licensee that the Los Angeles stockholder-licensee's retailers had advertised Sealy headboard ensembles below [fol. 243] the agreed upon and set minimum price (GX 812, 818; Tr. 1820-1822, 1830-1831; Doc. 3-3906, 3-3906A, 3-4049).

217. In October 1952, J. R. Lawrence for Sealy, Inc. wrote a retailer in Ohio concerning one of the retailer's ads which violated Sealy, Inc.'s resale policy and requested and solicited the cooperation of the store in preventing a reoccurrence. Lawrence further asked the retailer for written assurance that he would be guided by Sealy, Inc.'s policy on resale merchandise in the future and that, if the retailer wished to run a comparative price on Sealy merchandise, to work out an agreement with the Cleveland licensee-member for merchandise other than Sealy's regular resale line (GX 814; Tr. 1825-1826; Doc. 3-4227).

218. In December 1952, Sealy, Inc. by E. H. Bergmann wrote to the Reading licensee-member concerning an ad by a retailer making an allowance of \$20.00 for an old mattress on a trade-in sale, and requested the Reading licensee-

member to call it to the attention of the retailer and tell the retailer not to use any type of trade-in ads on Sealy merchandise (GX 815; Tr. 1826-1827; Doc. 3-4052).

219. In February 1953, the Cleveland stockholder-licensee wrote to Sealy, Inc. that certain retailers in Wheeling, West Virginia, and Youngstown, Ohio, who were retailers of the Pittsburgh stockholder-licensee, had advertised the Sealy Posturepedic mattress with a \$5.00 trade-in allowance, and that some of the Cleveland stockholder-licensee's dealers were disturbed about it. E. H. Bergmann, president of Sealy, Inc., telephoned the Pittsburgh stockholder-licensee who in turn contacted the retailers involved and wrote Sealy, Inc. that the retailers denied doing such advertising (GX 816-817; Tr. 1828-1830; Doc. 3-3982, 3-3983).

220. In April 1953, the Brooklyn stockholder-licensee sent Sealy, Inc. an ad run by a retailer of the Memphis stockholder-licensee featuring a Sealy Smooth sleep mattress at a compared price in violation of Sealy, Inc.'s regulations. Mr. Bergmann for Sealy, Inc. wrote the Memphis stockholder-licensee and requested him to see if Sealy, Inc. and the Memphis stockholder-licensee could halt this type of handling of Sealy merchandise. The Memphis stockholder-licensee thereupon wrote the retailer and informed him that the ad was a violation of Sealy's retail advertising policy and ads of that type must not be run in the future, the particular mattress must be offered at its set resale price, and all selling must be done at the pre-ticketed price (GX 819-821; Tr. 1832-1836; Doc. 3-4231, 3-4232).

221. In June 1953, the Cleveland stockholder-licensee sent Sealy, Inc. an ad run by a retailer which showed a Sealy Posturepedic mattress at a cut price and requested Sealy, Inc. to write the retailer its usual firm letter even though the retailer was not a dealer of the Cleveland stockholder-licensee (GX 822; Tr. 1837-1838; Doc. 3-4235).

222. In July 1953, E. H. Bergmann for Sealy, Inc. wrote the Paterson licensee-member concerning an ad run by one of the Paterson licensee-member's retailers which violated Sealy, Inc.'s advertising policy and further stated that although the president of Sealy, Inc., had the right to reject any ads that are inconsistent with policy for credit

on the advertising program, Bergmann would allow the ad to go in for credit, but asked the Paterson licensee-member to watch his accounts and see that they do not run ads inconsistent with Sealy, Inc. policy (GX 823; Tr. 1838-1839; Doc. 3-4233).

223. In August 1953, Sealy, Inc. wrote the Fort Worth licensee-member concerning an advertisement run by one of the Fort Worth licensee-member's retailers which violated practically all the rules of Sealy's comparative price policy by "breaking" the price on the Sealy Posturepedic mattress and advertising a Sealy product below the agreed upon and set minimum price, and requested the Fort Worth licensee-member to write Sealy, Inc. concerning the matter (GX 824; Tr. 1839-1840; Doc. 3-4233).

224. E. H. Bergmann writing for Sealy, Inc. requested the Pittsburgh stockholder-licensee in December 1953, to [fol. 246] protest to one of his retailers because an ad run by the retailer on a Sealy product violated the Sealy comparative policy by advertising the mattress as a regular \$59.50 mattress for \$39.95 and contained a "save twenty dollars statement" two weeks before the announcement of Sealy's national anniversary promotion (GX 825; Tr. 1841-1842; Doc. 3-4164).

225. In April 1954, E. H. Bergmann, president of Sealy, Inc., wrote the Kansas City licensee-member concerning an advertisement run by one of the Kansas City licensee-member's retailers which showed Sealy products below the agreed upon and set minimum retail price. Mr. Bergmann stressed the point that "Sealy *cannot* and *will not* tolerate such violations in the future," and threatened to put the Kansas City licensee-member on probation if any further infractions occurred from the time of such infractions to the end of the licensee agreement. Copies of the letter also were sent to licensee-members in Memphis, Louisville, Chicago, Des Moines, Denver, Houston, and Forth Worth. Subsequently, the Kansas City licensee-member wrote Mr. Bergmann that he had written every key account in his area urging them not to run any advertising on Sealy merchandise, other than those set up through Sealy's mat service, without obtaining a careful double check by the Kansas City sales representative, in order to reduce the possibility of running ads that may contain violations of

Sealy, Inc.'s policy, and enclosed a copy of that letter [fol. 247] (GX 826, 829-830; Tr. 1842-1846, 1851-1856; Doc. 3-3729, 3-3730, 3-3733 to 3-3735).

226. The Cleveland stockholder-licensee in May 1954 notified one of his retailers that an ad run by the retailer constituted an extremely serious violation of Sealy advertising policy by advertising a Sealy product after the end of the permissible promotion period. That letter, a copy of which was sent to Sealy, Inc. and the Detroit stockholder-licensee, further stated:

The second violation is that the anniversary and Golden Sleep *may not be sold* or advertised for less than \$39.95, whereas your ad showed this merchandise at \$37.88.

These policies are established not by our factory, but by Sealy nationally and, therefore, there are national repercussions when such ads are run. [Emphasis supplied]

and requested the retailer to assure the Cleveland stockholder-licensee in writing that these Sealy products would not be advertised out of season, nor advertised or sold for less than the specified minimum (GX 833; Tr. 1859-1861; Doc. 3-4135, 3-4136).

227. In May 1954, Mr. Bergmann writing for Sealy, Inc. informed the Baltimore licensee-member that one of the Baltimore licensee-member's retailers had violated Sealy, Inc.'s advertising policies. The Baltimore licensee-member thereupon wrote the retailer that his advertisement was inconsistent with Sealy policy. A copy of this letter was [fol. 248] then forwarded by the Baltimore licensee-member to Mr. Bergmann at Sealy, Inc. who in turn complimented the Baltimore licensee-member on this letter and stated "*This is just the type of policing that we should do in combination of the national and local offices* in cementing the retailers' minds to our advertising rules" (emphasis supplied) (GX 834-835; Tr. 1861-1865; Doc. 3-4160, 3-4161).

228. In July 1954, E. H. Bergmann, president of Sealy, Inc., wrote to the Louisville licensee-member and in August 1954 wrote the Chicago licensee-member about extracting a promise from a retailer in both licensee-members' territories not to advertise any Sealy mattress for less than \$39.95 during the periods of Sealy, Inc.'s anniversary and

Golden Sleep promotions and requested the licensee-members to arrange this agreement with the retailer (GX 676-677; Tr. 1612-1615; Doc. 3-3674, 3-3675).

229. In July 1954, J. R. Lawrence writing for Sealy, Inc., informed the Cleveland stockholder-licensee that one of the Cleveland stockholder-licensee's retailers had advertised a Sealy product in a manner that violated Sealy, Inc.'s schedule on price comparisons and, further, that the Cleveland stockholder-licensee should take it up with the retailer and see that Sealy, Inc.'s policy on the retail advertising of Sealy merchandise was followed in the future (GX 836; Tr. 1865-1866; Doc. 3-4230).

[fol. 249] 230. In July 1954, J. R. Lawrence, executive vice president of Sealy, Inc., wrote the Baltimore licensee-member that one of the Baltimore licensee-member's retailers in Washington, D. C. had advertised a Sealy product below the agreed upon and set minimum retail price (GX 837; Tr. 1866-1867; Doc. 3-3877).

231. In September 1954, E. H. Bergmann, writing for Sealy, Inc., informed the Cleveland stockholder-licensee that one of the Cleveland stockholder-licensee's retailers had violated Sealy, Inc.'s policies by advertising Sealy products below the agreed upon and set minimum retail price, and requested the Cleveland stockholder-licensee to dispatch a letter to the retailer immediately, which letter would remind the retailer of Sealy, Inc.'s minimum retail price regulations and at the same time ask the retailer to confirm compliance with these regulations in future ads. Bergmann further requested the Cleveland stockholder-licensee to furnish Sealy, Inc. with a copy of his letter to the retailer (GX 838; Tr. 1868-1869; Doc. 3-4137).

232. In September 1954, J. R. Lawrence, writing for Sealy, Inc., informed the Cleveland stockholder-licensee that an organization calling itself Club Sales Merchandise Plan was circulating a catalog showing Sealy products below the agreed upon and set retail prices for these products and requested the Cleveland stockholder-licensee to help Sealy, Inc. trace down the source of these Sealy products (GX 839; Tr. 1869-1871; Doc. 3-4229).

[fol. 250] 233. E. H. Bergmann, president of Sealy, Inc., in September 1954 wrote the Chicago stockholder-licensee

that one of the Chicago stockholder-licensee's retailers, Marshal Field & Company, had advertised Sealy products below the agreed upon and set minimum retail price and suggested that the Chicago stockholder-licensee inform the retailer to maintain the minimum retail price in the future (GX 840; Tr. 1872-1873; Doc. 3-4140).

234. Sealy, Inc., under the signature of E. H. Bergmann, wrote the St. Paul licensee-member in November 1954 about the St. Paul licensee-member permitting Sealy products with price tabs indicating retail prices to be sold and advertised at other than the retail tab price and instructed the St. Paul licensee-member to inform his sales manager and the retailers involved "that *there is a basic principal in Sealy of advertising and merchandising to the effect that if an article is pre-ticketed, it cannot be reduced in any manner, shape, or form*" (emphasis supplied) (GX 842; Tr. 1875-1876; Doc. 3-3779).

235. In January 1955, the Waterbury stockholder-licensee reported to Sealy, Inc. that a retailer of the Brooklyn stockholder-licensee had run an advertisement, which showed Sealy products below the agreed upon and set minimum retail price, enclosing a copy of the advertisement and expressed the certainty that Sealy, Inc. was doing all it could to correct the situation (GX 844; Tr. 1878-1880; Doc. 3-4145).

[fol. 251] 236. In February 1955, E. H. Bergmann for Sealy, Inc., had the Waterbury stockholder-licensee purchase a mattress from a discount house, which had listed a Sealy Posturepedic mattress below the agreed upon and set price, to ascertain the source of the discount house's supply of Sealy products. This source was thereby traced to the Brooklyn licensee-member (GX 845; Tr. 1880-1881; Doc. 3-4144).

237. E. H. Bergmann, writing for Sealy, Inc. in February 1955, informed the Richmond stockholder-licensee that a retailer of the Richmond stockholder-licensee had cut the price on the Sealy Anniversary mattress and further stated that "in the serious violations of our policies by retail dealers that this office [Sealy, Inc.] must take recognition of such violations" and "that this firm must be told that if there be a further violation of this nature that the national office [Sealy, Inc.] will take a position that the

account must be denied any further Sealy merchandise." The Richmond stockholder-licensee thereupon wrote to the retailer about the violation and quoted the above statements from Mr. Bergmann's letter. After writing to the retailer, the Richmond stockholder-licensee replied to Bergmann, that he felt that Bergmann's solution to the situation was correct. Subsequently, E. H. Bergmann for Sealy, Inc. wrote the Richmond stockholder-licensee that he should not sell the tabloid circular on a forthcoming Posturepedic event to this retailer but, if the Richmond stockholder- [fol. 252] licensee felt he wanted to sell this to the retailer, then it was necessary for the Richmond stockholder-licensee to obtain a letter from the retailer stating definitely that the retailer would not reduce any price in the circular. Bergman further stated if the retailer reduced any prices in the circular it would create chaos in that portion of Virginia and Washington, D.C., which is handled by the Baltimore licensee-member, and stressed that "Under no circumstances must *we* have a reoccurrence of this dealer violating *our* rules" (emphasis supplied) (GX 846-848; Tr. 1882-1886; Doc. 3-4157 to 3-4159).

238. E. H. Bergmann, president of Sealy, Inc., in February 1955, wrote the St. Paul licensee-member concerning an advertisement by one of the St. Paul licensee-member's retailers which showed Sealy products at reduced prices in violation of Sealy, Inc.'s advertising policies, and stated that Sealy, Inc. prohibited the reduction of any pre-ticketed Sealy product and that such ads could not be tolerated since they created chaos for the St. Paul licensee-member's other retailers and the retailers of contiguous Sealy plants. Bergmann further stated that, if the dealer persisted in running ads that were inconsistent to Sealy's established policy of advertising and merchandising, Sealy, Inc. would not hesitate to tell the St. Paul licensee-member to which accounts he could or could not sell Sealy merchandise and instructed [fol. 253] the St. Paul licensee-member to advise his retailer of the seriousness of these violations of Sealy, Inc.'s retail advertising policy (GX 849; Tr. 1889-1891; Doc. 3-3777, 3-3778).

239. In March 1955, C. B. McGillivray, sales manager of the Chicago stockholder-licensee, wrote one of the Chicago stockholder-licensee's retailers, with a copy to Mr. Berg-

mann of Sealy, Inc. concerning an ad which the retailer had run which showed a Sealy mattress below the agreed upon and set minimum retail price and thereby violated Sealy, Inc.'s retail advertising regulations. The retailer's general manager agreed to run a retraction of the advertisement and gave the Chicago stockholder-licensee permission to use a copy of the retraction to reverify the Sealy, Inc. policy with other Chicago dealers who advertised and featured Sealy mattresses (GX 674; Tr. 1610-1611; Doc. 3-3673).

240. E. H. Bergmann of Sealy, Inc. in March 1955 wrote to the Cleveland stockholder-licensee that he had received a copy of an ad run by a retailer of the Cleveland stockholder-licensee which violated Sealy, Inc.'s retail advertising rules, and requested the Cleveland stockholder-licensee to take steps to correct it and write a letter to the retailer admonishing him not to advertise a Sealy mattress in a manner which would violate Sealy, Inc.'s retail advertising regulations and to send a copy of this letter to Sealy, Inc. (GX 851; Tr. 1893-1894; Doc. 3-4228).

[fol. 254] 241. E. H. Bergmann for Sealy, Inc. in March 1955, wrote the Chicago stockholder-licensee about an advertisement by one of the Chicago stockholder-licensee's retailers which showed a Sealy product below the agreed upon and set retail price as covered by a Sealy policy bulletin and requested the Chicago stockholder-licensee to verify the correctness of the advertisement and the correctness of the price restriction. The Chicago stockholder-licensee replied that he thought that Sealy should not object to the advertisement. Thereafter, Sealy, Inc. informed the Chicago stockholder-licensee that the ad was definitely a violation of the Sealy policy (GX 680-682; Tr. 1620-1625; Doc. 3-3667 to 3-3669).

242. In April 1955, E. H. Bergmann for Sealy, Inc., wrote the Allston licensee-member concerning an advertisement run by a retailer of Allston licensee-member which Bergmann had received and which violated Sealy, Inc.'s retail advertising policy, and informed the Allston licensee-member that Allston had violated the rules by permitting such an ad to be run and that "there must not be any repeats of this type of handling" (GX 852; Tr. 1894-1895; Doc. 3-4231).

243. In April 1955, the Louisville licensee-member wrote Sealy, Inc. that he had been approached by a firm which wanted to purchase Sealy products from the Louisville licensee-member. This firm had previously shown Sealy [fol. 255] products below the agreed upon and set retail prices and was located at the same address at which a discount house was operated. The Louisville licensee-member further informed Sealy, Inc. that he had refused to sell this firm and had been informed by that firm that it could buy Sealy products from a Chicago outlet and requested Sealy, Inc. to check with the Chicago outlet and find out why it had sold to the retail firm in Louisville. Subsequently, E. H. Bergmann for Sealy, Inc. wrote the Chicago outlet stating that (a) the Louisville firm previously had shown Sealy products below the agreed upon and set retail prices; (b) the Louisville firm upon being refused Sealy products by the Louisville licensee-member had told the Louisville licensee-member he could get Sealy products from the Chicago outlet; (c) Sealy, Inc. could not and would not sell any type of firm which did not maintain Sealy, Inc.'s retail prices; and (d) Sealy, Inc. definitely did not want the Louisville firm to have any Sealy merchandise (GX 854-855; Tr. 1897-1900; Doc. 3-4146, 3-4147).

244. In May 1955, the Chester licensee-member, at the request of one of his retailers, wrote Sealy, Inc. requesting permission to allow the retailer to promote a Sealy product in conjunction with a trade-in allowance during a week-long promotion by merchants in Atlantic City where the retailer was located. E. H. Bergmann for Sealy, Inc. denied this request, stating that Sealy, Inc. could not grant an ex-[fol. 256] ception to the rule in Sealy policy bulletins which restricted trade-in sales (GX 683-684; Tr. 1626-1628; Doc. 3-3501, 3-3502).

245. In June 1955, the Chicago stockholder-licensee wrote to one of his dealers concerning an ad run by the dealer which violated Sealy's retail advertising policy in showing Sealy products below the set minimum retail selling price and requested the dealer to inform its advertising department of the violations so there would be no repetition of such policy violations in the Chicago area.

A retrial would be especially insupportable here in light of the fact that the United States previously called in question the territorial restrictions of Sealy's license contracts through a Federal Trade Commission proceeding.⁸⁸ After full hearings, the Commission in 1948 held that the evidence failed to support the allegations of the complaint, and dismissed the proceeding.⁸⁹ The present record shows

⁸⁸ The FTC Complaint, filed March 18, 1944, like the present Complaint, charged Sealy and its licensees with maintaining an unlawful combination and conspiracy to "restrain and prevent competition in the manufacture, sale, and distribution of Sealy products," in part as follows:

"Pursuant to . . . said combination, conspiracy and agreed and planned common course of action, respondent Sealy, Inc., and respondent members of the Sealy group, agreed . . . among themselves that each of the . . . members of the Sealy group should enter into . . . an agreement and contract with . . . Sealy, Inc. . . . [which] provided:

"(a) That . . . Sealy, Inc., shall allot to the contracting . . . member of the Sealy group an exclusive territory within which such member is confined for the manufacture, sale, and distribution of products manufactured under the terms and conditions of said contract, . . ." Sealy, Inc., 45 F.T.C., 730, 733 (1948).

⁸⁹ In its order dismissing the Complaint, the FTC made the following statements:

"Ten of the manufacturing respondents herein are stockholders in and, in the aggregate, own more than three-fourths of the shares of stock of Sealy, Inc., now outstanding, and they and the 13 other manufacturing respondents have contractual relations with Sealy, Inc., but are each otherwise separately and independently engaged in the manufacture and sale of bedding products. . . .

"Having considered the allegations of the complaint in the light of the evidence of record, and being of the opinion that the allegations respecting restraint of trade have not been sustained by the greater weight of the evidence, . . ." Sealy, Inc., *supra* note 88, at 735.

that Sealy has continued with the same structure and purposes. The Government has shown no change of circumstances, and indeed does not even claim injury to retailers or consumers by reason of Sealy's licenses, or diminution in the vigor of competition or the strength of either the smaller local and regional companies, or the large national companies, against which the Sealy licensees compete.

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed.

Respectfully submitted,

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